## APPENDIX A

Title 18 U. S. Code, § 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available

to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

* * * * *

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## APPENDIX B

## UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 12,554

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UNITED STATES OF AMERICA

*v.*

JOEL ROSENBERG,

*Appellant.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

Argued June 9, 1958

---

Before: KALODNER, STALEY and HASTIE, *Circuit Judges.*

**Opinion of the Court**

(Filed July 22, 1958)

HASTIE, *Circuit Judge.*

For a second time in the course of this litigation we must determine whether withholding from the defendant certain data which defense counsel had asked the govern-

ment to surrender for inspection and possible use in the cross-examination of witnesses, has amounted to reversible error under the principles announced in *Jencks v. United States*, 1957, 353 U.S. 657. On the first appeal we set aside appellant Rosenberg's conviction, holding that the "failure of the trial judge to permit counsel for the defendant to inspect at the trial the witness' grand jury testimony and statement to the F.B.I., as required by the rule announced in the *Jencks* case, compels us to grant a new trial." 245 F.2d 870, 871.

A new trial followed. The defense again asked that the government produce for its examination reports and statements which might facilitate cross-examination of two prosecution witnesses. The prosecution produced all of the records it had of its dealings with these witnesses. The trial judge then examined the data to determine how much of it was relevant and potentially useful for the purposes of the defense. As a result of this examination the court permitted defense counsel to examine and use most of the data. However, the court ruled that certain items were irrelevant and, over objection, denied the defense permission to examine them. At the same time, the court did make the documents in question part of the record for our consideration on appeal.

The crime for which appellant has been convicted was the transporting of a check in interstate commerce after participating in the fraudulent scheme by which the check had been obtained. 18 U.S.C. § 2314. The government's theory was that the appellant had collaborated with one Meierdiercks in the entire criminal enterprise. Meierdiercks appeared and testified as an important government witness. At the conclusion of his direct testimony the defense asked that it be permitted to examine the government's records of and concerning prior statements by the witness. A similar request was made for data concerning statements of the prosecuting witness, Florence Vossler, who had been the victim of the fraudulent scheme.

We have examined all of the items which the defendant was not permitted to examine. Several of the documents contain no reference to, much less the text or any summation of, anything said by either witness. For example, two are office memoranda concerning the progress and procedure of a then pending prosecution of Meierdiercks. Another paper contains a detailed physical description and summary personal history of Meierdiercks. Still another is a record of an unsuccessful search for certain names on hotel registers at or about the time of the crime. These and other miscellaneous items from the prosecutor's files were obviously not germane to the request of the defendant. Why the prosecution produced them is not clear. Their surrender could not have been responsive to the defense request or to any proper request for whatever records the government had made, in verbatim text or otherwise, of prior statements of certain witnesses.

There was also a minute or office notation stating as a fact that, on first questioning, Meierdiercks had denied any involvement in the alleged wrongdoing. In some circumstances it might well have been improper to withhold this summary record of what the witness had said. But here Meierdiercks' first verbatim statement to the Federal Bureau of Investigation, denying implication in the wrongdoing, was among the papers surrendered to the defense. There was no point, therefore, in adding a general notation that he had made a denial of this kind. Similarly, the court withheld a typewritten copy of a later detailed statement of the witness about the crime. This too was surplusage, because the original longhand text of that very statement was surrendered to the defendant.

More troublesome is the fact that the court withheld from the defense a letter written to the prosecutor by the victim, Miss Vossler, just before the second trial of the case, in which she expressed concern that the lapse of time

had made her recollection of details of relevant transactions hazy so that she would have to rely upon her previous detailed statement to refresh her memory. Certainly an admission by a witness to the prosecutor that time has thus dimmed her recollection of events as to which she is to testify is a type of statement which should be made available to the defense under the *Jencks* rule. But after examination of the actual testimony of Miss Vossler we think it clear that the defendant suffered no prejudice from this error. First, on cross-examination this witness was in fact questioned as to whether she had used any prior statement or testimony in preparing for this second trial. She admitted quite forthrightly that she had read her former statement a few days before the trial. Moreover, defense counsel was allowed great latitude on cross-examination in testing what the witness said on this trial by comparing her testimony with earlier statements made in and out of court. There was no pretense by the witness that she remembered details of remote transactions as well as one would remember a very recent occurrence. And, absent any effort of the witness to create such an impression of unusually good memory, her pre-trial statement that time had dimmed her recollection merely admitted a fact of universal experience and common knowledge, of which the jury must have been aware in any event. Finally, no contested issue in this case depended upon the exactitude of this witness' recollection of details of remote transactions. In all the circumstances, we are unable to see any way in which the defense may have been prejudiced by the withholding of this statement.

Appellant is also dissatisfied with the timing of the surrender of the documents he was permitted to examine. He says that he should have received these records before the beginning of the trial rather than after the witness in question was called to testify. The *Jencks* rule is designed solely to facilitate proper cross-examination. *Cf. United States v. Grossman*, D.N.J. 1957, 154 F.Supp. 813. If the

requested records are made available during the trial before cross-examination of the witness concerned, and counsel is allowed reasonable time to examine the data and analyze it in relation to the exigencies of cross-examination, the *Jencks* rule is satisfied. Here the documents concerning Meierdiercks, aggregating thirty-five pages, were in the possession of the defense from adjournment on Monday afternoon until cross-examination of this witness began at 2 P.M. on Tuesday. This was a reasonable time in all the circumstances. The records concerning Miss Vossler consisted of only nine pages. A two hour luncheon recess and an additional forty minute recess were allowed for examination of this data before cross-examination began. And even on this appeal counsel does not point out any way in which the material concerning either witness would have been more useful, had more time been given to study and analyze it before cross-examination. Therefore, we think the appellant has no valid complaint on this score.

We have not commented upon the statute, 28 U.S.C. (Supp. V) § 3500, enacted since the *Jencks* case to define procedure in administering the *Jencks* rule, since, regardless of procedure, we have found no prejudicial withholding of anything to which defendant was entitled under the *Jencks* rule. We do note, however, that the government did not identify any particular documents or particular portions of documents which in its view should not be disclosed to the defendant. The statute seems to contemplate that the government shall thus particularize any objection it may have, rather than that the court search at large through whatever documents the prosecution may tender in an effort to determine what is relevant and what is not. And if the government does not thus particularize its objections, we see no reason why the court should not routinely permit the defense to inspect whatever the government produces in response to a proper request.

A wholly different matter is urged as a separate reason for a new trial. The appellant complains of the trial court's

refusal to grant a continuance just before the beginning of the trial, when it appeared that one of counsel, upon whom the appellant had relied to take chief responsibility for conducting his defense, had become ill and could not be present at the trial. However, the force of appellant's argument is blunted by the fact of unwarranted delay in presenting this matter in the court below. The attorney in question is a Boston lawyer. This case was listed on the trial calendar to be called in Philadelphia Monday morning. The preceding day, Sunday, the defendant was in Boston and learned that his Boston attorney required immediate surgery and could not come to Philadelphia. This information was communicated that day by telephone to defendant's Philadelphia counsel. Yet, on Monday morning when the trial calendar was called, Philadelphia counsel answered "ready for trial". The judge who was administering the calendar then routinely assigned the case for trial to another judge, who happened to have presided at the first trial. It was not until the following day, Tuesday, that Philadelphia defense counsel asked for a continuance because of the necessary absence of chief counsel. Thus, for no apparent good reason the defendant postponed any request for continuance beyond the first and normal opportunity afforded by the calendar call and until it was determined which judge would try the case.[1] For us as a reviewing court this circumstance alone is sufficient to preclude interference with the trial court's refusal to grant the delayed motion for a continuance.

Other trial errors are alleged on this appeal. Most of them concern the introduction of evidence and the giving of instructions to which trial counsel interposed no objection. In none of these episodes do we find that appellant has suffered prejudice or injustice, or that the trial court has committed reversible error.

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[1] Unquestionably the defense was unhappy about this trial assignment for counsel in open court frankly expressed his fear that the assigned judge would not have an open mind about the case because of his experience in trying it before.

The judgment will be affirmed.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

---

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,554

UNITED STATES OF AMERICA
vs.
JOEL ROSENBERG,
*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, STALEY and HASTIE, Circuit Judges.

**Judgment**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
HARRIET G. HUMPHRYS
*Chief Deputy Clerk*

July 22, 1958

Office-Supreme Court, U.S.
FILED
NOV 14 1958
JAMES R. BROWNING, Clerk

No. 451

# In the Supreme Court of the United States

OCTOBER TERM, 1958

JOEL ROSENBERG, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*
MALCOLM ANDERSON,
*Assistant Attorney General,*
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
*Attorneys,*
*Department of Justice, Washington 25, D. C.*

# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 451

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*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–8a) is reported at 257 F. 2d 760. The opinion of the District Court is reported at 157 F. Supp. 654. The opinion of the Court of Appeals on a prior appeal is reported at 245 F. 2d 870.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1958. Petitioner's motion for rehearing was denied on August 15, 1958. On September 9, 1958, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 14, 1958. The petition was filed on October 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to allow petitioner to examine a letter written by the complaining witness to the prosecutor, in which she expressed concern that lapse of time since the events in question had made her recollection hazy as to details so that she would have to rely upon her previous detailed statement to refresh her memory.

2. Whether the trial court abused its discretion in denying petitioner a continuance, sought on the basis of the illness of one of his counsel, where petitioner's co-counsel, knowing of such illness and inability to participate in the trial, allowed the case to be marked ready for trial and sought a continuance only after it was assigned to a judge to whom petitioner objected.

3. Whether petitioner was prejudiced by proof, to which no objection was made, that a substantial sum of money was found in his room at the time of his arrest, where counsel on cross-examination brought out the fact that the money had been ordered returned.

## STATUTES INVOLVED

18 U. S. C. 2314 provides, in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *
>
> * * * * * *

18 U. S. C. (Supp. V) 3500 provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from

the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent

of the Government and recorded contemporaneously with the making of such oral statement.

## STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania on charges of transporting in interstate commerce a fraudulently obtained check for $5,760 and of conspiracy to commit that offense. He was sentenced to five years imprisonment on the substantive count and was given a suspended sentence of three years imprisonment on the conspiracy count (App. 1a-3a).[1] The Court of Appeals affirmed (Pet. App. 2a–8a).

1. The principal witness for the government was one Charles K. Meierdiercks, a co-conspirator with petitioner. His testimony was that, under the direction of petitioner, he had approached a Miss Florence M. Vossler on the subject of buying some oil leases in New Mexico which she owned. The witness made her an offer; petitioner followed with a better offer made over the telephone; then, a third party also made an offer by telephone. When the price had been bid up to an attractive level, Miss Vossler agreed to sell the leases to the fictitious company which Meierdiercks said he was representing for the sum of $57,600 (App. 19a–29a).

Meierdiercks then brought up a matter which, as he later testified, was the purpose of the whole scheme.

[1] The record submitted consists of an appendix, a supplemental appendix for appellant and appellee's appendix, hereinafter referred to respectively as "App.", "Appellant's Supp. App." and "Appellee's App." The appendix to the petition is referred to as "Pet. App."

He pointed out that the tax due by Miss Vossler on the transaction would be very high, but that there was a perfectly legitimate way whereby this could be avoided. There was, he said, a provision in the law, applicable only to oil companies, whereby the purchaser could assume the tax and pay only ten percent of the purchase price. He assured Miss Vossler that this was legitimate. After some hesitation, she gave him a check for $5,760, an amount which she understood was to be returned to her at the time she was paid for her oil leases (App. 29a–38a). Petitioner took this check from New Jersey to Washington, D. C. and there had it cashed. Petitioner later gave Meierdiercks a part of the proceeds of the check, though less than the amount which had been agreed upon (App. 46a–47a).

2. Petitioner's case was set for trial on Monday, September 30, 1957. According to an affidavit of petitioner's Boston attorney, Mr. Dangel, filed in support of petitioner's motion for a new trial, Mr. Dangel was advised by his physician, the preceding Friday, that he should undergo an operation. Until that time, Mr. Dangel had expected to participate at the trial. Mr. Dangel tried unsuccessfully to reach petitioner and then sent a letter asking petitioner to see him. On Sunday, in the presence of petitioner, Mr. Dangel called co-counsel, Mr. Stanley Singer of Philadelphia, and told him that he (Dangel) could not participate in the trial unless it were postponed (App. 6a–8a).

Thereafter, Dr. Levine called Mr. Dangel and told him of arrangements for him to enter the hospital and

be operated upon, that week.[2] Mr. Dangel had petitioner obtain a note of explanation from Dr. Levine (App. 7a–8a).

With this knowledge, Mr. Singer went into court, the following day, and was present when the list was called. The case was marked ready for trial without his objection. *United States* v. *Rosenberg*, 157 F. Supp. at page 657. The case was assigned to Judge Van Dusen, who had presided at petitioner's previous trial. Not until Tuesday, after this assignment was made, did Mr. Singer request a continuance (App. 9a–13a; Appellee's App. 2b–8b; 157 F. Supp. at page 657). He said that he had spoken with Mr. Dangel on the telephone the day before and that the latter had said that he was not feeling well, but that he (Singer) had not known Dangel could not be present until he got the letter from Dr. Levine, which petitioner handed him about fifteen or twenty minutes after he had answered the call (App. 10a).

The government opposed the application because of the distance the government witnesses had come (from Chicago, Boston and Baltimore), because of the long delay since the first trial (two and one-half years), and because of the fact that Mr. Singer had played an important part in the first trial (App. 10a). Mr. Singer responded that he could not possibly have made the application earlier; that he was only the liaison man; and that many of the papers were still with Mr. Dangel (App. 11a).

[2] Dr. Levine corroborated this by affidavit (App. 9a). No affidavit of Dr. Prien, who had notified Mr. Dangel that an operation would be necessary, was submitted.

The court asked counsel for both sides to call Dr. Levine in Boston. The doctor stated that the condition necessitating surgery had been known to the physicians since Tuesday of the preceding week, but that it was not certain that Mr. Dangel had known of it before Friday (Appellee's App. 4b). The court made inquiry as to Mr. Singer's experience in trying criminal cases, which appeared to be quite extensive, and the Assistant United States Attorney commented on the admirable manner in which Singer had previously tried the case (Appellee's App. 5b–7b). The court denied the application (App. 1a).

## ARGUMENT

1. Petitioner was permitted to see prior statements and the grand jury minutes of the testimony of the government witnesses for the purpose of impeachment, but the court did not turn over papers which merely duplicated documents made available. Nor did it direct production of a letter written to the prosecutor by Miss Vossler, the victim, just before the second trial of the case, in which she expressed concern that the lapse of time had made her recollection of details of relevant transactions hazy, so that she would have to rely upon her previous detailed statement to refresh her memory (Pet. App. 4a–5a). The Court of Appeals thought that this document should have been turned over but that the failure to do so was not, in the circumstances, prejudicial. The court pointed out that Miss Vossler admitted "quite forthrightly that she had read her former statement a few days before the trial"; and that she made

no pretense that her testimony was exact in all particulars (Pet. App. 5a). The court also emphasized that the details of her testimony were of no moment. Her testimony corroborated Meierdiercks' testimony that she had given a check for $5,760 upon his representation that it would be used to discharge an obligation for taxes, and that she had never received this money back nor received the agreed purchase price for the oil leases.

The Court of Appeals, we believe, gave an unduly broad interpretation to *Jencks* v. *United States,* 353 U. S. 657, and 18 U. S. C. 3500 when it expressed the view that the letter was the type of document which ordinarily should have been turned over. Under *Jencks,* the government was required to produce, on demand, "relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial." 353 U. S. at page 672. The letter at issue did not touch on the subject matter of Miss Vossler's testimony, but was a mere inquiry as to the delay in bringing the case to trial, accompanied by a statement that the witness, in view of the lapse of time, would have to refresh her recollection of details.

Nor did the letter constitute the kind of statement referred to in 18 U. S. C. 3500. The statute is addressed to a statement "which relates to the subject matter as to which the witness has testified," and statement is defined as being either (1) a written statement made and signed or otherwise adopted or approved by the witness or (2) a stenographic or electrical recording, or a transcription thereof which is a substantially verbatim recital of the witness' oral

statement, recorded contemporaneously with the making of the oral statement. In other words, the statute contemplates that a version of events given at the trial may be checked against a prior written account of the same events given extra-judicially. It does not fit this case.

In any event, if there was error, it was, for the various reasons stated by the Court of Appeals, harmless. Petitioner's suggestion that there can never be harmless error if a document is not produced finds no support in the cases. By its nature, harmless error is a matter which must be determined in the light of the whole record (see *Kotteakos* v. *United States,* 328 U. S. 750, 757–767), and a finding of error in one case, on the basis of particular facts, cannot be said to be in conflict with a finding of "no error" on the particular facts of another case. In *Jencks,* the statements withheld were contemporaneous reports of the witness with respect to testimony which was crucial to the case. In *Bergman* v. *United States,* 253 F. 2d 933 (C. A. 6), relied upon by petitioner, the documents not turned over to the defense were statements by five witnesses concerning the subject matter of their testimony. The statement here involved was not of the same character. Since the statement of Miss Vossler which *did* bear on her testimony was turned over to the defense, and since the only facts which the unproduced letter could have shown were otherwise developed, the finding of harmless error by the Court of Appeals was fully warranted.

2. The application for a continuance after the case had been called and petitioner's counsel had allowed it to be marked ready for trial was a matter calling for

the application of a sound judicial discretion. The trial court set forth its reasons for denying the application in 157 F. Supp. at pages 656–659, 663–664, pointing out, among other things, that any missing files could have been easily mailed from Boston; that Mr. Singer was in the case from the beginning and was the most active of any counsel participating in the defense; that he was experienced in defending criminal cases; that petitioner himself was not inexperienced in criminal matters and could have communicated with Mr. Singer, if he had wished, before the case was called; and that the first time objection was made was on Tuesday, October 1, at which time the case had been assigned to Judge Van Dusen, as to whom petitioner expressed the objection that he "would not be the proper judge to hear this particular case (157 F. Supp. at 662)." In these circumstances there is no basis for a claim that there was an abuse of discretion in denying the continuance.

3. An F. B. I. agent testified that, at the time of petitioner's arrest, $6000 in cash was found in petitioner's room (App. 54a-55a, 58a, 60a–62a). Although this is now challenged as prejudicial, no objection was raised, as the Court of Appeals noted (Pet. App. 7a), at the trial. We point out, moreover, that, on cross-examination of the agent, petitioner's counsel brought out the fact that the United States District Court in Illinois had ordered that the money be returned to petitioner on the ground that there was no showing that it was connected with a crime. The agent also testified that he did not know the source of the money (Appellee's App. 14b–15b).

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
MALCOLM ANDERSON,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
*Attorneys.*

NOVEMBER 1958.

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# Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 451.

JOEL ROSENBERG,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR THE PETITIONER.

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## Table of Contents.

## Table of Authorities Cited.

CASES.

STATUTES, ETC.



TEXTBOOKS.

# Supreme Court of the United States.

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JOEL ROSENBERG,
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UNITED STATES OF AMERICA,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR THE PETITIONER.

### Opinions Below.

The opinion of the United States District Court for the Eastern District of Pennsylvania as to the first trial is reported in 146 F. Supp. 555. The opinion of the United States Court of Appeals for the Third Circuit reversing the conviction and ordering a new trial is reported in 245 F. 2d 870. The opinion of said District Court as to the second trial (R. 72-85) is reported in 157 F. Supp. 654, and the opinion of the said Court of Appeals as to the second trial (R. 94-100) is reported in 257 F. 2d 760.

## Jurisdiction.

The judgment of the Court of Appeals was entered on July 22, 1958 (R. 99). By order of Mr. Justice Brennan dated September 9, 1958, the time for filing a petition for writ of certiorari was extended to October 14, 1958 (R. 100). The petition was filed on October 14, 1958, and was granted on December 8, 1958 (R. 101). 358 U.S. 904. The jurisdiction of this court rests upon 28 U.S.C. § 1254 (1).

## Statute Involved.

This case involves in part the constitutionality of the entire or portions of 18 U.S.C. § 3500, which was passed after the decision in the case of *Jencks* v. *United States*, 353 U.S. 657, after the commission of the offenses herein alleged and after the first trial of the same. The provisions of the statute are as follows:

DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter

of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. [Added by Pub. L. 85—269, Sept. 2, 1957, 71 Stat. 595.]

## Questions Presented.

The following questions are presented for review:

Is the rule of this court in *Jencks* v. *United States* (1957), 353 U.S. 657, a rule of mere procedure, or does it involve a defendant's constitutional rights?*

May a clear violation of this rule be harmless error?

May the conceded error of a trial court in withholding from defense counsel prior statements of principal government witnesses be excused because a Court of Appeals finds that the defense was not hampered in cross-examination of those witnesses?

Is it proper for a Court of Appeals to determine what use defense counsel might have made of statements erroneously withheld?

## Statement of the Case.

The petitioner was charged in two counts with transportation in interstate commerce—from Philadelphia to

*Included in this question is whether 18 U.S.C. § 3500, is constitutional.

Washington, D.C.—of a certified check of $5760 procured by fraud from Miss Vossler, with knowledge of its fraudulent procurement, in violation of 18 U.S.C. § 2314. The first count set forth his conspiring in violation of 18 U.S.C. § 371 with C. K. Meierdiercks and an unknown individual who used the name of Mr. Rice in dealing with Miss Vossler; the second count alleged the substantive offense (R. 72, note 1).

After a trial in November, 1956, in the District Court before Judge Van Dusen and a jury (146 F. Supp. 555) and a reversal by the United States Court of Appeals for the Third Circuit (245 F. 2d 870) because of the refusal of the trial judge to afford the petitioner the rights to which he was entitled under the rule of the *Jencks* case (353 U.S. 657) as to statements to the Federal Bureau of Investigation of the government witnesses Meierdiercks, Vossler and others, and also because the trial judge refused to afford the petitioner the right to examine the grand jury testimony of those government witnesses, the case was retried *before the same trial judge* (157 F. 2d 654) (R. 72), the petitioner was found guilty and sentenced, and on appeal (R. 94) the judgment was affirmed (257 F. (2d) 760), and this court allowed certiorari limited to the questions stated above.

## Proceedings Prior to Second Trial.

*On August 30, 1957*, one month before the date for which this case was set down for a second trial, the petitioner filed three motions (R. 1, 4, 5), two of which were for the right to inspect and examine (1) statements and reports of declarations made by principal government witnesses to the Federal Bureau of Investigation, and (2) testimony of such witnesses before the grand jury, and the third was for a reasonable continuance to enable the petitioner to make

such inspection and examination (R. 5, 6, 7). The three motions were denied (Lord, J.) (R. 7, 8)—

> "on the ground that the decision in *Jencks* [case] . . . does not require the production of the documents covered by these motions until such time as a witness is actually put on the stand by the Government."

Before the trial the petitioner presented these same motions to the judge assigned to preside at the trial (R. 7, 9), when they were again denied and the following colloquy occurred:

R. 11, ll. 4-30:

> "[*Mr. Bechtle:*] . . . we are all incapable of telling Mr. Singer what he is entitled to.
>
> "*The Court:* I would agree with that on everybody except Meierdiercks, but it seems quite clear that you are going to call Mr. Meierdiercks.
>
> "*Mr. Bechtle:* Yes, quite clear.
>
> "*The Court:* And it also seems fair to the defendant that he have an opportunity to examine Mr. Meierdiercks' statement and the grand jury minutes fully. I am also reluctant to go against this statute, [18 U.S.C. §3500] and the way I suggest we handle it is that we have the jury selected and sworn, have the opening speeches, call Meierdiercks and put him on the stand—we will not finish the testimony today—and then when he is on the stand *I* will give the statements to Mr. Singer, and in that way *I* will be complying with both the Jencks case and the statute. [Emphasis added.]
>
> "As to the others, . . . I do not think you are entitled to them, really, with Meierdiercks, until the direct testimony is finished, but under the circum-

stances that we know Meierdiercks is going to be the principal witness, *I* will give you more than you are entitled to. [Emphasis added.]

"*Mr. Singer:* . . . These witnesses have already testified."

R. 12, ll. 13-19:

"*The Court:* . . . *I* will give you the statement by Meierdiercks in full and everything he said before the Grand Jury, . . . When they call the other witnesses, then you can make your application. Now, they could try the case without any witnesses but Meierdiercks, under my memory." (Emphasis added.)

R. 12, ll. 27-37:

"*Mr. Singer:* . . . under the facts and under the Jencks decision, notwithstanding the applicable federal statutes, we are entitled *at this time* . . . to see those particular matters *prior to the time of trial.*" (Emphasis added.)

R. 13, ll. 3-23:

"[*Mr. Singer:*] . . . we feel that under the ruling in the Jencks decision—

"*The Court:* Well, that is all it says, that I did not give them to you. I am going to give them to you. It doesn't say when I have to give them to you.

"*Mr. Singer:* . . . we are entitled to them for something slightly more than impeachment value alone . . . in order to properly prepare our defense . . . it is impossible for [the Government] to . . . hope to try this case without the testimony of Meierdiercks . . . so . . . we are entitled, in order to properly prepare our case and to investigate various claims, to have

complete and full disclosure with a minimum as to Meierdiercks, in reference to any and all statements that he has made to the FBI concerning the particular alleged transaction, and as to any and all statements that he has made before the Federal Grand Jury in this respect. And . . . the fairness of the trial demands that the defendant be afforded that minimum degree of protection."

R. 13, bot.:

"[*The Court:*] Your record is protected. You applied for these things before, and Judge Lord has turned you down. You have applied for them again, and I have not given you everything you asked [for]."

## Testimony of Witnesses.

The evidence upon which the Government principally relied consisted of the testimony of two witnesses, Charles Kenneth Meierdiercks (R. 14-54) and Florence M. Vossler (R. 54-65).

*Meierdiercks, whose testimony was uncorroborated as to the petitioner's connection with the crimes charged,* testified as follows:

He was presently an inmate of Atlanta Penitentiary. In December, 1954, he was in the business of buying and selling oil leases (R. 15). He knew Miss Vossler. He and the petitioner met after New Years, 1955, and the petitioner said he had a customer that he wanted him to call on in Jersey (R. 16). They made arrangements for him to go the next day to East Orange, New Jersey, to see Miss Florence Vossler, who owned a lease (R. 17) in New Mexico (R. 18). His, Meierdiercks', purpose was to meet Miss Vossler and

establish a bid on her leases after determining that she was willing to sell (R. 18), although he, Meierdiercks, did not intend to buy (R. 18). The petitioner told him what to offer and to ascertain if she was willing to sell and what other leases she had and everything else (R. 18). The next morning the petitioner drove him to East Orange (R. 18) and he told Miss Vossler that he was Chester LeRoy (R. 38) and that he represented a group of people who were interested in buying a particular lease (R. 19). After that he met the petitioner and told him what happened (R. 23). He, Meierdiercks, saw Miss Vossler again two days later (R. 23). In the meantime the petitioner had telephoned Miss Vossler in the presence of Meierdiercks and represented himself to be an interested buyer and raised the price (R. 23). Miss Vossler told Meierdiercks that a man named Rice had called her and offered her $20 or $25 (R. 23). Then he and the petitioner went back to New York (R. 24). After the second visit the petitioner telephoned Miss Vossler again; said that he was sorry that was all that he could pay (R. 25).* Following that call Meierdiercks had a third meeting with Miss Vossler, at which time she agreed to sell the lease to the company he represented (R. 26). The next day he went to see Miss Vossler and told her that his people agreed to pay the price and that she would be getting $57,600 (R. 27). Then he said to Miss Vossler, among other things:

> "Now Miss Vossler, you have a tax problem to consider, and I don't know what tax bracket you are in, but if you are in a high bracket, . . . you may have to pay as much as 80% taxes on the profit of this transaction." (R. 27, ll. 17-25.)
>
> ". . . Well, there is a legal way of putting this deal through so that you won't have to pay a personal tax, which is high." (R. 27, ll. 31-33.)

*Miss Vossler denied that there were any telephone calls (R. 56, ll. 17-18).

> "Well, if it is put through as an oil deal, the oil companies have an exemption of 27½% on leases and . . . this deal can be put through as an oil company deal and we can work it out so that you would only have to pay 10%." (R. 27, ll. 34-39.)

So they worked it out, and Meierdiercks said:

> "Now, the thing is that you will have to put up in advance the [$5760] which will be 10% of [$57,600]. . . . give it to us and we pay it, and then we reimburse you by giving you the total price plus the money that you put up in advance." (R. 28, ll. 8-13.)

There was never any real intent to purchase oil leases for $57,000. The real intent was to get the $5700 (R. 29). Meierdiercks arranged to meet her the following morning and go to Philadelphia, where she would draw the cash from her bank and give it to him (R. 28). Meierdiercks reported to the petitioner what was going on between him and Miss Vossler as carefully as he could remember it (R. 29) and the petitioner gave him instructions which he followed "to the letter" (R. 30 bot., 31 top). Meierdiercks and Miss Vossler went to Miss Vossler's bank in Philadelphia (R. 31, bot.), where she procured a certified check for $5760 (Ex. G-1) (R. 33). Then they went to the Bellevue Stratford Hotel. The petitioner was in the lobby but never in Miss Vossler's presence (R. 34). She asked Meierdiercks for a receipt (R. 34) and he obtained one from the petitioner, who wrote it out for $5760 (R. 35) and Meierdiercks handed it to Miss Vossler (Ex. G-2) (R. 35). Miss Vossler called his attention to the fact that the receipt was not signed, whereupon he signed it "Gulf Production Company. Chester LeRoy," and put the numbers of her leases on the back and handed it to her, and she read it (R. 35,

bot.; 36, top). Miss Vossler gave Meierdiercks the check and he then scratched a note on note paper, put the check inside the paper and put them both in an envelope addressed to Dallas or Houston, Texas (R. 35, ll. 14-17), sealed it and put a stamp on it (R. 38, ll. 17-19), and proceeded to mail it (R. 35, ll. 16-17). Meierdiercks went to the mailbox and put an empty envelope with no address on it in the mailbox and put the envelope with the check in his pocket (R. 38, ll. 21-24). Meierdiercks then walked over to the petitioner and said: "I have the check" (R. 38). The petitioner said: "We have got to get the check cashed" (R. 39, ll. 15, 16), and Meierdiercks said:

> "Well, you can call the New Mexico Oil and Gas Lease Exchange at Washington . . . tell [Mr. Bowles] that you want to buy . . . a New Mexico oil lease, and you can go down there and he will give you the lease and cash the check for you and give you the difference in cash." (R. 39, ll. 17-22.)

The petitioner called Mr. Bowles (who did not testify) and made an appointment and left almost immediately (R. 30, ll. 23-25). Then Meierdiercks took Miss Vossler to a restaurant for dinner, took her to the railroad station, and put her on the train for home (R. 41). He intended to go to Baltimore, but changed his mind and went to New York (R. 41, ll. 26-39). That evening the petitioner telephoned Meierdiercks and said he was unable to cash the check because he had arrived too late; that it would be cashed the following morning, and that he would call Meierdiercks on his arrival in New York (R. 42, ll. 10-14). The next day, about 4.30 or 5 o'clock, the petitioner called and said he had the money, would like to proceed to Boston, and wanted Meierdiercks to meet him at the Lincoln Tunnel exit of the New Jersey Turnpike (R. 42, ll. 15-20). Meierdiercks asked

one Gorman (who did not testify) to meet the petitioner, and Gorman brought back approximately $1100 or $1200, although Meierdiercks was supposed to get $1800 (R. 43, top).

*Miss Florence M. Vossler, who neither identified nor involved the petitioner,* testified that—

She knew Meierdiercks by the name of Chester LeRoy (R. 54, 55). His first call at her house was on January 14, 1955, in regard to some federal leases of oil land which she had in Wyoming (R. 55). (Meierdiercks testified that it was in New Mexico (R. 18).) He offered $20 an acre and a 1/32 override, which is in the nature of a royalty if and when oil is discovered (R. 56). *She received no calls after his visit* (R. 56, ll. 17-18). On the following Monday a man who said his name was Rice, *who was not in the courtroom,* came to see her at 9 o'clock in the morning and said he was interested in the leases (R. 56, bot.) and made an offer of $30 an acre and a 3% override. Mr. LeRoy came back that afternoon or the following morning (R. 57, ll. 10-14) and they had some discussion about the price and override. The question of tax came up and there was not too much said about it at that time (R. 57, ll. 29-36). The next day it came up more definitely (R. 57, l. 38). Meierdiereks visited her on Tuesday and Rice came later (R. 57, bot.; 58, top). Meierdiercks said to her that—

> ". . . I could receive the same treatment as any other business firm or another oil company . . . ; they buy and sell leases from each other, and that I could make the same arrangement, that I would get a net amount of money and they would take care of the tax, but that I would have to advance 10% of the sum . . . supposed to be received by me eventually." (R. 58, ll. 4-10.)

Later she went with Meierdiercks from East Orange to Philadelphia on January 19th (R. 58, ll. 32-35). Meierdiercks suggested that she give him cash and he would wire it to his firm in Texas, but she refused and said she would give him a certified check (R. 59, ll. 11-17). She wanted to know with whom she was dealing, and Meierdiercks pulled out a contract from his pocket on which was printed "Gulf Production Corporation," which was made out to another man and contained an offer of $22 per acre in Wyoming in a location not far from hers, and the contract was signed at the bottom with three names, one of which was Chester LeRoy (R. 59, ll. 18-30). At the Bellevue Stratford Hotel they sat at a desk in the lobby and Meierdiercks said he would telephone his supervisor in Texas and went to the rear of the lobby for this purpose (R. 60, ll. 13-16). When he came back he said that the papers were temporarily held up (R. 60, ll. 20-22). She was supposed to go home and Meierdiercks was supposed to go to Baltimore (R. 61, ll. 24-26). She never saw Meierdiercks again until the trial.

PETITIONER'S REQUESTS DURING TRIAL FOR PRODUCTION OF (1) STATEMENTS TO THE F.B.I. OF GOVERNMENT WITNESSES MEIERDIERCKS AND VOSSLER; (2) REPORTS OF F.B.I. AGENTS CONCERNING SUCH WITNESSES; AND (3) CORRESPONDENCE BETWEEN GOVERNMENT WITNESS VOSSLER AND UNITED STATES ATTORNEY.

At the conclusion of the direct testimony of Meierdiercks the petitioner requested that the Government produce for his examination and inspection all the prior written statements, recordings of oral statements of the witness Meierdiercks, and all reports of F.B.I. agents, whether or not they are summaries of conversations or interviews held with the witness Meierdiercks (R. 45-49; 82, bot.; 83, top;

95, ll. 19-22). The following colloquy occurred (R. 45, ll. 20-26):

> "*Mr. Singer:* . . . It is my recollection that Meierdiercks testified or admitted—at the prior hearing . . . —to giving more than one statement to the F.B.I., and . . . he was interviewed on more than one occasion, and I have received merely one statement. I believe I am entitled to all the statements that this individual made to the F.B.I. . . .
>
> . . . . . .
>
> "*Mr. Bechtle:* . . . The recent statute [18 U.S.C. § 3500] provides that a defense counsel in a criminal case such as this is—has the benefit of this turnover proceeding. These types of statements that he is entitled to is a written statement that he has signed, approved, or otherwise accepted, or a statement that has been taken simultaneously by a stenographer and which he has approved or accepted."

The attitude of the United States Attorney was that the petitioner was not entitled to the original report of Meierdiercks' oral statement to an F.B.I. agent (R. 46, ll. 2, 3), because Meierdiercks did not sign, approve or accept it (R. 47, top).

R. 47, ll. 10-17:

> "*The Court* [to United States Attorney]: All right. Now, I think that you had better turn over *to me* these agent's reports which were made after conferences with Mr. Meierdiercks, and *I* will go over them, and if *I* find that they are in effect the recording of what he said, *I* can delete those portions of them, if they contain other material which is not relevant to his testi-

mony on direct examination here, and turn them over to the defendant's counsel." (Emphasis added.)

R. 47, ll. 2-38:

"*Mr. Singer:* . . . I see nowhere in the text of the approved bill [where] the statement must be . . . accepted by the testifying individual as reflected by Mr. Bechtle. What they are doing is putting the government in a position that if they have seven statements they give the one that they consider most beneficial to their case. I feel—

"*The Court:* Not at all. It says here [18 U.S.C. § 3500] that you are only entitled to a written statement of the witness signed or otherwise accepted or approved by him, or a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is substantially verbatim recital of an oral statement.

"Now, obviously this type of statement doesn't fall within any of those descriptions, but in order to lean backwards *I* am going to look at them, and if *I* feel that it is fair for the defendant to have them, you can be sure, they will be given to you." (Emphasis added.)

R. 48, ll. 2-19:

"*The Court:* [Subsection (e)] specifically states that it has got to be in effect a recording of exactly what he said. Now, that doesn't meet with the description of the statements which the U. S. Attorney has made here.

"*Mr. Singer:* . . . I feel . . . that that section of this Act that tends to limit procedurally or otherwise the scope of the Jencks decision is unconstitutional

. . . in that it is . . . a legislative attempt to modify, alter, change or completely do away with a decision that was rendered by the Supreme Court of the United States, and any [such] attempt by the Legislature is a dangerous precedent to be established, and . . . that matter is properly before [this] Court on this very issue at this time.

"*The Court:* Well, I will take that argument into consideration. That is a perfectly proper argument.

"Now, *I* will read over these statements with that in mind, . . ." (Emphasis added.)

R. 49, ll. 10-32:

"*Mr. Singer:* . . . I feel that I should voice at this time an objection on the basis that we did not receive the entire file that the F.B.I. had as . . . to statements made by Meierdiercks concerning this particular action, and I feel that under the decisions of the United States Supreme Court we are entitled to full disclosure as to all statements made by a witness relative to this particular action that is pending before this court and that any attempt by the court to modify or limit this source of information on the basis of a new ruling that was recently enacted by the legislature is an unconstitutional interference with the judicial functions of the court and a dangerous precedent to be followed.

"*The Court:* You have already made that clear, and everything that the United States Attorney says the F.B.I. has has either been given to you or put in the envelope which the reporter has, which contains the balance of C-5 and C-6 that has not been furnished you. So that is as much as I can do. I think the Jencks case, as well as the statute, both say that you are only entitled to material which is *relevant* to the

*direct examination* testimony of the witness, and *that is the basis on which I have excluded the material that is in the envelope.*" (Emphasis added.)

The petitioner was given some but not all of the statements and no reports, and he duly excepted to the court's refusal to give him all of the same (R. 49, ll. 33-36). The petitioner was permitted to examine such statements during the noon recess from 11 a.m. to 2.15 p.m. (R. 83, top).

At the conclusion of the direct testimony of Miss Vossler the petitioner requested that the Government produce for his examination and inspection all the prior written statements and recordings of oral statements of the witness Miss Vossler; all reports of F.B.I. agents, whether or not they are summaries of conversations or interviews held with the witness Miss Vossler; and a series of letters between her and the United States Attorney (R. 62-64; 83, ll. 11-14; 95, ll. 22-24). The following colloquy occurred (R. 62, ll. 25-28; 62, ll. 29-34; 63, ll. 1-4):

"*The Court:* Well, the government has already turned over *to me* for delivery to you C-8, which is a statement, a report, dated February 21, 1955, which has attached to it a statement of the witness which *I* will give you. C-9, which is a summary of a conference with the witness attached to a report dated June 15, 1955; and C-10, which are two pages of a report of May 2, 1955.

"Now, the government has also made available a whole series of letters, correspondence . . . between the United States Attorney's Office, and Miss Vossler, and *I* will look through these and see if they have any bearing on the testimony. . . ." (Emphasis added.)

The United States Attorney contended that the petitioner's right to turnover was limited by the recent statute (18 U.S.C. § 3500) and the petitioner's right was limited to the statements concerning Miss Vossler's testimony which she had adopted or signed (R. 63, ll. 21-26).

The colloquy continued, R. 63, ll. 27-39:

> "*The Court* [to United States Attorney]: . . . some of these statements that you wouldn't voluntarily give, but you will be granted exception . . . to my action.
>
> "Now, *I* suggest you read those over, and meanwhile *I* will read these letters and see if there is anything in them. It appears to me that the letters merely concern Miss Vossler's coming here to testify, but *I* will look over all of them and *I* will put them in a separate envelope which will be marked C-12 so that they will be here for any appellate court to look at. . . ." (Emphasis added.)

R. 64, ll. 5-7:

> "(Correspondence between U. S. Attorney's Office and F. M. Vossler, except for C-13 and C-14 was placed in a sealed envelope marked C-12 for identification.)

R. 64, ll. 18-26:

> "*Mr. Singer:* . . . we are not denying the allegation that Mrs. Vossler is making from the stand, not in the least, but there are certain things that she has not testified to that are contained in these other reports. There are certain items which we assume are as truthful as the statements she is making here, and we want to get all this on the record. We feel that the Court, the ladies and gentlemen of the jury, and the defendant are entitled to have all these facts on the record."

Miss Vossler was interviewed by certain agents at her house a few times (R. 64, bot.).

The petitioner was permitted to examine such statements of Miss Vossler as were given to him during a forty-minute recess and also during the luncheon recess (R. 83, ll. 11-13).

## Summary of Argument.

The petitioner's position is that the rule of the *Jencks* case is a rule of *substantive due process* under the Fifth Amendment and not a rule of procedure; that it deals with fundamental rights; that the declaration of the rule is an exercise of judicial power and Congress has no power to annul, change, modify or affect it; and that 18 U.S.C. § 3500, is unconstitutional.

The *Jencks* rule established that in the federal courts, as part of a "fair trial," an accused has a right—

(*a*) without a prior submission to and determination by the trial judge, and without showing any conflict of testimony, to have the Government produce and turn over directly and initially to him, for his examination, inspection and legitimate use, all documents, papers and letters in its possession, written by a government witness or orally made by him as recorded by the F.B.I., as well as reports of its agents touching events and activities as to which such witness will testify or has testified at the trial;

(*b*) to be heard on the admissibility of the contents of such documents, papers and letters and the method to be employed for the elimination, if any, of any part of them; and

(*c*) to be discharged when the Government refuses to turn over all of such documents, papers and letters.

In the instant case it was certain beforehand that Meier-diercks and Vossler were the two principal government

witnesses, and the petitioner, seasonably before and again during his trial after each witness had testified, moved that the Government turn over and deliver *initially and directly* to him all the documents, papers and letters in its possession which in any way concerned those two principal witnesses, and that he be permitted to examine, inspect and make reasonable use of them in preparing and presenting his defense; that his motions before trial were denied because of the provisions of 18 U.S.C. § 3500, which prohibited furnishing the accused with such documents until the witness had testified at the trial; that, while during the trial the Government produced some documents, papers and letters, it was not permitted by the trial judge to give them initially and directly to the petitioner, but was required to and did present them to the trial judge for his *in camera* examination and inspection; that some of the documents were turned over to the petitioner, and others were withheld and sealed in an envelope by the trial judge and transmitted to the Court of Appeals without affording the petitioner an opportunity to see them or to be heard as to their contents.

The Court of Appeals likewise examined their contents *in camera*, and the petitioner has never had an opportunity to see the documents which were put into the sealed envelope, or to be heard as to their contents.

After its *in camera* examination of the documents, papers and letters, the Court of Appeals affirmed the conviction because it determined (*a*) that they would not have been of material benefit to the petitioner in his *cross-examination* of the two principal government witnesses; and (*b*) that the actions of the trial judge were not harmful to the petitioner.

The petitioner was deprived of substantive rights expounded in the *Jencks* case by being denied—

(*a*) the right to have the Government produce and turn over to him *initially and directly* all the documents, papers and letters in its possession, *before trial;*

(*b*) the right to have the Government produce and turn over to him *initially and directly* all the documents in its possession *during trial,* without interference by the trial judge;

(*c*) the right to see and examine and to be heard as to the contents of the documents which the trial judge placed in the sealed envelope;

(*d*) the right to know of what evidence he is being deprived; and

(*e*) the right to know the basis of the ruling of the trial judge.

In the Court of Appeals the petitioner was deprived of practically the same rights.

## Argument.

### I.

### Is the Rule of This Court in Jencks v. United States (1957), 353 U.S. 657, a Rule of Mere Procedure, or does it Involve a Defendant's Constitutional Rights?

"Substantive law" is generally defined to be that class of law which creates, defines and regulates rights and duties as distinguished from the procedural or adjective law, which deals only with the steps to be taken to enforce the rights and impose the duties.

*Barker* v. *St. Louis County,* 340 Mo. 986.
*Jones* v. *Erie R.R.,* 106 Ohio St. 408.
40 Words & Phrases, "Substantive Law," p. 524.
34 Words & Phrases, "Procedural Law," p. 74.

". . . substantive law, as constitutionally, legislatively, and judicially recognized, includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property, and quite generally as fixing the type of remedy available in case of invasions of those rights."

*Kellman* v. *Stoltz* (D.C., Iowa), 1 F.R.D. 726, 728.

Of course, every individual has a constitutional right to a "fair trial." As was said in *United States* v. *Brodson*, 155 F. Supp. 407, 408:

"It is the duty of this court to see that the defendant has a fair trial. Where the enforcement of the Government policy would deprive the defendant of a fair trial, it is the duty of the court to give precedence to the right of the defendant to have a fair trial over and above the Government policy."

It naturally follows that everything that goes to make up a "fair trial" is equally a constitutional right and "the failure to observe that fundamental fairness essential to the very concept of justice" is a denial of due process.

*Lisenba* v. *California*, 314 U.S. 219, 236.

The *Jencks* rule is a rule of substantive law and not of evidence, just as the parol evidence rule.

*Zell* v. *American Seating Co.*, 138 F. 2d 641, 643.

It does not deal with admissibility, weight, sufficiency or consideration of evidence, but with the right of one party—the accused—to have the adverse party—the Government

—produce for his initial examination documents which may be of evidentiary value, so that he may determine whether to use them in his defense. Certainly, the right to procure the production of documents is not a rule of evidence any more than the right to have a witness produce himself upon a subpoena or documents upon a subpoena *duces tecum*. It deals with the right of the accused to fully prepare his defense—to procure and produce evidence—to ascertain matters relating to the credibility of government witnesses —to discover evidence which may be favorable to him—to learn facts which upon further investigation may be helpful to his defense, and to be heard by the trial judge before he makes any determination which may deprive the accused of any of the foregoing.

*Roviaro* v. *United States*, 353 U.S. 53, 61.

The *Jencks* case declares the rule that an accused has a right to—

(1) "evidence relevant and material to his defense" without "requiring the accused first to show conflict between the [F.B.I.] reports and the [witness's] testimony . . ." (353 U.S. 667, bot.);

(2) "the production for inspection of documents in the Government's possession" and "For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule . . ." (353 U.S. 666, 667);

(3) "order directing the Government to produce for [his] inspection all reports of [the government's witnesses] in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial" (353 U.S. 668, 669);

(4) initially and directly "inspect the [F.B.I.] reports [upon their production] to decide whether to use them in his defense" (353 U.S. 668);

(5) be heard "after inspection of the reports" before the "trial judge determine[s] admissibility . . . of the contents and the method to be employed for the elimination of parts immaterial or irrelevant" (353 U.S. 669);

(6) "go free [when the] . . . Government . . . undertake[s] . . . its governmental privileges to deprive . . . [him] of anything which might be material to his defense" (353 U.S. 671, 672).

These are constitutional rights, not matters of mere procedure. They clearly demonstrate that "due process of law" requires that an accused have the right to be protected from the arbitrary exercise of the power of the Government to withhold, suppress or conceal documents from him which may be of value in his defense, and the right to know what evidence is made unavailable to him and to be heard before he is deprived of it. Proceedings *in camera*, in effect, deprive the accused of the full benefit of the assistance of counsel. Surely, an accused should be placed upon the same footing as the prosecution, which can examine and inspect the data and reports about the witnesses who testified against the accused without the *in camera* perusal by the trial judge.

*A. 18 U.S.C. § 3500, is Unconstitutional.*

Congress cannot exercise judicial powers. That is prohibited by the clear words of Article III of the Federal Constitution. Any legislative attempt to that end would be a nullity. Manifestly, it is the exercise of judicial power to prescribe what constitutes "due process of law" and a

"fair trial." 18 U.S.C. § 3500, enacted after the *Jencks* decision, attempts to dispense with many of the substantial protections to which a person accused of crime is entitled under that case. This Congress could not do.

*Thompson* v. *Utah*, 170 U.S. 343, 351.

Congress has attempted to reinstate practically every prohibition announced in the *Jencks* case as violative of "due process" of law and a "fair trial," *e.g.*, the initial *in camera* examination by the trial judge; the excising of portions of statements and reports without disclosing the same to the accused; the *in camera* examination by appellate courts;* the denial of the accused's right to the full benefit of assistance of counsel whose function it is to determine what shall and shall not be offered as evidence and to point out its materiality and relevancy which may never occur to the trial judge, also to offer proof in refutation of any statement of a government witness; the opportunity of fully preparing his case; and prohibiting any statement or report to be given to the accused until the government witness has testified.

*In other words,* the statute deals with a matter that is substantive and not procedural—the right of the accused to procure evidence, to cause its production, and to examine and inspect it, not necessarily to use it. The effect of the statute is to deprive the accused of an opportunity to fully and seasonably prepare his defense, of evidence that may be in the control of the Government, and of a "fair trial."

*B. Petitioner's Motions should have been Allowed.*

Both the assignment judge (Lord, J.) and the trial judge (Van Dusen, J.) in disposing of the pretrial motions were

*Reminds one of the Star Chamber proceeding and trial *in absentia*.

guided entirely by the statute, 18 U.S.C. § 3500. No matter of discretion was involved. In this case, the two principal government witnesses, particularly Meierdiercks, were well known to be essential to proof of the Government's case. It was essential to a fair trial that the accused have a reasonable opportunity to examine the documents in the Government's control concerning these witnesses and the facts disclosed by them, not necessarily for impeachment use only.

The statement of the Advisory Committee concerning Rule 41 (e) of the Federal Rules of Criminal Procedure seems apt:

> "The sound judicial practice is not to interrupt the orderly course of trial and break the continuity of the jury's attention by conducting a collateral inquiry into the question of whether evidence should be produced."

In this case the Government should not have been permitted to thwart the petitioner's right to production, examination and inspection under the *Jencks* rule by the stratagem of waiting until Meierdiercks and Miss Vossler had testified and then to rush the petitioner, while the court and jury were waiting, into examining and inspecting the documents and not obtaining the full benefit of the documents produced.

Judge Swinford, in *United States* v. *Hall*, 153 F. Supp. 661, said at 664:

> ". . . this language [of the *Jencks* case] entirely dissipates any thought that the court must wait until the trial of the case and be actively engaged in the trial before the requirement to produce the documents can be made. There could be no reason for such a rule. The parties have notice of the date of trial. The idea

of setting the case far in advance is to give them an opportunity to prepare for trial. If the trial of a case had to be interrupted in the middle of the trial for the examination of these statements, the court would necessarily then have to postpone or interrupt the progress of the trial for a reasonable time until the defendants had an opportunity to seek out, examine and subpoena witnesses that might rebut the statements.

"Rules 16 and 17, Rules of Criminal Procedure, 18 U.S.C., are the methods by which documents may be brought into court for use at the trial. In discussing Rule 17 (c) the court said in Bowman Dairy Co. v. United States, 341 U.S. 214, that its chief innovation was to expedite the trial by providing the time and place *before trial* for the inspection of the subpoenaed material."

The importance of a pretrial examination and inspection of the F.B.I. reports and statements of government witnesses is illustrated by what Judge Estes said in *United States* v. *Papworth,* 156 F. Supp. 842, 853.

Surely, the motions made at the conclusions of the direct testimony of government witnesses Meierdiercks and Vossler should have been allowed. The items sought by the petitioner in his pretrial motions and in his motions during the trial were material to the preparation and presentation of his defense.

## II.

### May a Clear Violation of this Jencks Rule be Harmless Error?

Violation of an individual's constitutional right does not involve the presence or extent of harm, prejudice or dis-

advantage he may suffer from it; it goes deeper. Its existence, not its effect, is material. In the instant case, it is the right of an accused to have documents produced by the Government for his examination and use. This is a constitutional right which cannot be lessened or destroyed by an Act of Congress.

*Hawk* v. *Olson*, 326 U.S. 271, 278.
*Glasser* v. *United States*, 315 U.S. 60, 76.
*Melanson* v. *O'Brien*, 191 F. 2d 963, 968, 969.
*Coplan* v. *United States*, 191 F. 2d 749, 759.
*United States* v. *Venuti*, 182 F. 2d 519, 522.

As was said by Judge Stewart in *Bergman* v. *United States*, 253 F. 2d 933, 936:

> "... it is not proper for this court to determine whether the appellants were prejudiced by failure to make available the prior statement of a witness, any more than it would be for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness's testimony in open court."

## III.

### May the Conceded Error of a Trial Court in Withholding from Defense Counsel Prior Statements of Principal Government Witnesses be Excused because a Court of Appeals Finds that the Defense was Not Hampered in Cross-Examination of Those Witnesses?

Both the Court of Appeals and the District Court misinterpreted the rule laid down in the *Jencks* case, which declared that the accused *must* be given the opportunity of seeing and knowing the material upon which the court

makes its ruling, and that it is contrary to natural justice for an accused to be subject to a determination without an opportunity to be heard and being fully apprised of the basis of such determination.

*Morgan* v. *United States,* 304 U.S. 1; s.c. 298 U.S. 468.
*Boott Mills* v. *Board of Conciliation & Arbitration,* 311 Mass. 223, 227.

The *Jencks* rule, in requiring the production of documents in the Government's control, does not limit their use to cross-examination. The rule puts the accused on a par with the Government. Information which the Government has concerning its witnesses is made *equally available* to him. As part of its duty to protect him against unfounded accusations, the Government is required to make available to him *all such evidence in its possession.*

*Griffin* v. *United States,* 183 F. 2d 990, 993.

The petitioner did not confine his purpose in requesting the documents to the facilitation of cross-examination of the government witnesses, as the Court of Appeals stated (R. 94, bot.). His purposes were threefold: (1) to prepare his defense, (2) to impeach the credibility of the witness or any other government witness; and (3) to investigate and present any matters revealed by the documents (R. 5, ll. 18-21; R. 6, ll. 21-25; R. 9, ll. 1-18; R. 13, ll. 8-11, ll. 15-16).

The Court of Appeals has examined the items which the petitioner has never been permitted to examine (R. 95, ll. 25-37; R. 96, ll. 1-14), and, without the benefit of hearing from the petitioner as to the use which he might have made of them, it has found that the defense was not hampered in cross-examination (R. 95-97).

An examination by the petitioner of the documents requested might have revealed something to him which the District Court and the Court of Appeals never conceived. For example, the Court of Appeals (R. 96, ll. 12-14) stated that "a typewritten copy of . . . Meierdiercks' statement . . . was surplusage, because the 'original' longhand TEXT of that very statement was surrendered to the defendant." The petitioner might have been able to point out that the typewritten copy was the "original" and that the longhand TEXT was the "copy."

## IV.

### Is it Proper for a Court of Appeals to Determine What Use Defense Counsel might have Made of Statements Erroneously Withheld?

Particularly applicable here is the language of the *Jencks* case, 353 U.S. 657, 668, 669:

> ". . . only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

It is no more proper for the Court of Appeals than it is for the District Court to determine what use the defense counsel might have made of the requested documents, particularly without affording him an opportunity seasonably and adequately to examine such documents and to present his contentions.

## Conclusion.

The Government has seen fit on two separate occasions to prosecute this case against the petitioner, and on each occasion it has denied him his fundamental rights. Therefore it should be deemed that the Government has elected to give up its right to prosecute him further, to the end that successive prosecutions for the same crimes should be avoided.

*Jencks* v. *United States*, 353 U.S. 657, 670, 671;
quoting from—
*United States* v. *Reynolds*, 345 U.S. 1, 12.

It is respectfully submitted that the judgment below should be reversed and the petitioner discharged.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 451

JOEL ROSENBERG,

*Petitioner.*

*vs.*

UNITED STATES OF AMERICA.

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

## Brief of Arthur L. Harris, Sr., Arthur L. Harris, Jr., Ernest F. Lea and Charles W. Marshall, Amici Curiae in Support of Petitioner.

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## SUBJECT INDEX

## TABLE OF AUTHORITIES CITED

### CASES



### RULES



### STATUTES

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This brief is filed with the written consent of the parties pursuant to Rule 42(2) of this Court. The consents accompany the original of this brief.

### Interest of Amici Curiae.

*Amici curiae* are the petitioners in *Harris v. United States,* No. 619, Oct. Term, 1958, in this Court. Said petition is now pending on petition for writ of certiorari. the Government's Brief in Opposition having been filed in February, 1959. For reasons which will appear from the discussion, there is a likelihood that the decision of this Court in this, the Rosenberg, case will have great

bearing on the disposition that will be made in *amici's* case.[1]

Before this Court the Government, for the first time, conceded and confessed that the trial court in *amici's* case had committed error in not permitting defense counsel at the trial to examine prior statements made by Government witnesses concerning the very matters they were testifying to in court. Before its reversal of position in this Court, the Government had stoutly maintained (in the trial court prior to this Court's ruling in *Jencks v. United States*, 353 U. S. 657, and in the court below after *Jencks*) that the withholding of the statements was proper and not error.

The Government's position before this Court in opposition to *amici's* petition for writ of certiorari is that the error was harmless. This contention *amici* vigorously dispute. But this *amici* brief is not the place, of course, to argue that point. However, since one of *amici's* arguments is that the "no-prejudice, harmless error" doctrine has no applicability to a Jencks type situation, and since the Government (Brief in Opposition, p. 10) and the court below in the instant case (257 F. 2d 760, 763), rely on the doctrine, this is an appropriate place for *amici* to set out their views on that subject. Hence this *amici* brief.

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[1]Other cases pending before this Court on Writs of Certiorari (*e.g., Lev v. United States*, No. 435; *Wool v. United States*, No. 436; *Rubin v. United States*, No. 437; *Palermo v. United States*, No. 471) may also have bearing upon the outcome of *amici's* case. But it is deemed sufficient to *amici* that they present their views in the one case, particularly since the Government's Brief in Opposition in the Rosenberg case seems to cast that case closest to *amici's*.

## ARGUMENT.

### I.

### Error in Refusing to Apply the Jencks Rule Is Inherently Prejudicial and Harmful. Hence an Adverse Judgment in a Case Where the Trial Court Erred in Refusing to Apply the Jencks Rule Cannot Be Saved on Appeal Under Guise of the "No-Prejudice, Harmless Error" Doctrine.

In its *Jencks* decision this Court said (353 U. S. 657, 667):

> "Every experienced trial judge and trial lawyers knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contract in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

And (353 U. S. at 668-669):

> ". . . Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. . . ."

Therefore, since the denial to the defense of the statement "is actually to deny the accused evidence relevant and material to his defense" (353 U. S. at 667), it follows that in the nature of things, and inherently, the

failure to follow the *Jencks* rule is prejudicial and harmful. Since only the defense is adequately equipped to make the determination, it is a *non sequitur* for the Government to argue, or for a Court of Appeals to affirm a conviction, on a theory, that the denial to the defense of evidence relevant and material to his defense is not prejudicial or is harmless error. This effort in mental gymnastics just cannot be; it is a contradiction is terms.

It is for this reason, we submit, that the Court of Appeals for the Sixth Circuit was correct in *Bergman v. United States*, 253 F. 2d 933, when it said (at p. 935):

> ". . . The failure of the district court to make Chitwood's prior statement available to the defense requires that the judgments be set aside. We reach the conclusion with reluctance in view of the likelihood that the failure to make Chitwood's statement available actually worked *no prejudice* to the defendants, and in view of generally conscientious and fair conduct of the long and complicated trial by the district judge." (Italics added.)

And (at p. 936 on rehearing):

> "Upon consideration of the petition for rehearing, we are of the opinion that *it is not proper for this court to determine whether the appellants were prejudiced* by failure to make available the prior statement of a witness, any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness's testimony in open court." (Italics added.)

We believe that, in the light of the argument made in the Government's Memorandum on petition for writ of certiorari in *Indiviglio v. United States*, No. 753, Oct.

Term, 1957, this Court's reversal (357 U. S. 574) demonstrates that the "harmless error" doctrine does not apply to a case involving a clear violation of the *Jencks* rule. In its memordandum on petition for writ of certiorari, in reply on the issue of the trial court's failure to turn over to the defense a statement of a government witness, the Solicitor General referred (p. 11) to his discussion in his Memorandum in *Giordenello v. United States,* No. 515 Misc., Oct. Term, 1957.[2] In that memorandum (p. 13) the Government conceded that the statement should have been produced to the defense. However, the Government sought to uphold the Court of Appeals' judgment on its theory of "harmless error." Thus the Solicitor General said (pp. 13-14):

> ". . . On this aspect of the case, we are also of the view that the error may properly be characterized as *harmless* and that failure to produce the statement is not grounds for reversal . . .
>
> ". . . Under these circumstances, the 'harmless error' doctrine is properly applicable to non-production of the statement here. Cf. *Sheba Bracelets v. United States,* 248 F. 2d 134, 144-146 (C. A. 2), certiorari denied, December 16, 1957 (No. 556, Oct. Term. 1957); *Simms v. United States,* 248 F. 2d 626, 629-630 (C. A. D. C.), where courts of appeal held non-production, although production was required by *Jencks,* to be *harmless* error. See also *United States v. Socony Vacuum Oil Company,* 310 U. S. 150, 235." (Italics, other than case names, added.)

In the face of this argument, this Court's reversal of *Indiviglio* (357 U. S. 574), citing the *Jencks* case, is

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[2]This Court's decision on the merits in that case is reported at 357 U. S. 480.

significant and, as we say, demonstrates the inapplicability of the "harmless error" rule to a *Jencks* situation. We believe our conclusion is bolstered by a consideration of the reversed opinion of the Court of Appeals in that case (249 F. 2d 549 at 564 and 565):

> ". . . the guilt of these appellants was abundantly established without any reliance upon Adams' testimony.
>
> ". . .
>
> ". . . The fair inference from this record is that the Government has at great expense turned up and convicted, by overwhelming evidence, some of the leaders of the narcotic traffic which is taking such grievous toll of the health and morals of the people particularly the youth of this land. . . .
>
> ". . . The error they (appellants) complain of is one relating to procedure alone. Appellants, arguing under the facts of this case for reversal, are more 'concerned with the mere etiquette of trials and with the formalities and minutiae of procedure' than with the substantial merits. . . .
>
> "Moreover, it is clear that appellants were not prejudiced by the challenged ruling of the trial court. . . ."

While it is true that this Court "reviews judgments, not statements in opinions," (*Black v. Cutter Laboratories*, 351 U. S. 292, 297) it is likewise true that this Court will "examine such opinion for the purpose of ascertaining the grounds of the judgment." (*Thompson v. Maxwell Land Grant & Railway Co.*, 168 U. S. 451, 456; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 295.)

So examined, it is manifest that the grounds of the Fifth Circuit's decision in *Indiviglio* was the "no-prejudice, harmless error" doctrine as urged by the Government on this Court, and, as seen, rejected by the reversal.

In sum, therefore, both on reason and on authority, we submit that error by a trial court in clear violation of the *Jencks* rule cannot be cured on appeal by reliance on the "no-prejudice, harmless error" doctrine. In such a case, the doctrine is self-contradictory.

## II.

## Violation by a Trial Court of the Jencks Rule Is a Denial to Defendant of a Fair Trial. Where a Defendant Is Denied a Fair Trial, He Is Entitled to a Reversal; Considerations of "Harmless Error" Do Not Enter the Picture.

In the *Jencks* decision, after pointing out that only the defense is equipped to determine whether the statements of the Government witnesses would be useful to him and therefore the defense is entitled to see them, this Court said (353 U. S. at 669):

> "Justice requires no less."

To us, these are words of constitutional right. These are words of due process of law.[3] In *Rochin v. California*, 342 U. S. 165, 169, this Court said:

> ". . . Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of

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[3] To Senator Hennings, the *Jencks* rule is a manifestation of the 6th Amendment right to confrontation (44 A. B. A. Jl. 213, 214).

> the proceedings [resulted in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, supra (324 US at 416, 417) . . ."

And again (342 U. S. at 173):

> ". . . Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' . . . ."

We do contend that it "shocks the conscience" (*Rochin v. California*, 342 U. S. at 172) for the Government to put a citizen on trial for, here, his liberty, property and reputation and then to withhold from him relevant and material evidence that may aid him in his defense. "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . ." (*United States v. Reynolds*, 345 U. S. 1, 12).

But whether the *Jencks* rule is a rule of constitutional law or is a rule of the federal courts, the refusal to apply which is "incompatible with our standards for the administration of justice" (*Jencks v. United States*, 353 U. S. 657, 668), the result is the same. For (*ibid.*) "the interest of the United States in a criminal prosecution". . . is

not that it shall win a case, but that justice shall be done. . . .' Berger v. United States, 295 US 78, 88 . . ." In either case, a fair trial has been denied and defendant is entitled to a reversal even if the appellate court might think that irrespective of the error, the defendant is, or would be found, guilty.

In *Bollenbach v. United States,* 326 U.S. 607, 614, this Court said:

> ". . . In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

In *United States v. Coplon,* 185 F. 2d 629, 638 (C. A. 2, 1950), cert. den. 342 U. S. 920, Chief Judge Learned Hand said:

> ". . . (W)e cannot dispense with constitutional privileges (the right to see evidence which the trial court had examined *in camera* and ruled that the evidence did not lead to any evidence adduced at trial) because in a specific instance they may not in fact serve to protect any valid interest of their possessor."

While in *Haley v. Ohio,* 332 U. S. 596, 599, this Court said:

> ". . . If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand even though without the confession there might have been sufficient evidence for submission to the jury. . . ."

In *Hawk v. Olson*, 326 U. S. 271, the claim was that there had been a denial of the right to counsel and of a continuance to consult same. Ruling in favor of the petitioner, this Court said (at p. 278):

> "Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect."

Other examples could, of course, be cited. The principle is clear: If the accused has been denied a fair trial, as we say is the case when a trial is conducted in violation of the *Jencks* rule, he is entitled to a reversal. The Court will not speculate as to whether he would be found guilty in a proceeding conducted in accord with proper standards. "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing *and maintaining* civilized standards of procedure and evidence." (Italics added.) (*McNabb v. United States*, 318 U. S. 332, 340.)

Certainly the *Jencks* rule stands in no inferior position than were the rule to have been one enunciated by Congress. The *Jencks* statute (18 U. S. C. 3500; 71 Stat. 595), so-called, passed by Congress after this Court's decision in the *Jencks* case is precisely and identically, at least for the purposes of this *amici* brief and *amici's* interest herein,[4] the *Jencks* rule as enunciated by this Court in the *Jencks* case.

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[4] In its Brief in Opposition in *amici's* case, the Government said (p. 16): "Under both the decision and the statute, we think that replies to the questionnaire, when requested, would be required."

Thus the Senate Report on the Bill stated (S. R. 981. 85th Congress; 2 U. S. Code Congressional and Administrative News 1957, pp. 1862, 1864):

> ". . . the proposed legislation, as here presented, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial, but excluding such matter which is within any valid exclusionary rule.
>
> ". . .
>
> "It appears to the committee that, briefly stated, the theory of the majority of the Court (in the Jencks case) is that if the Government sends into court a witness to testify against a defendant, and the Government has, at the same time in its files, an authenticated statement or report by the witness having to do with the activities of the defendant, the defendant is justified in asking for and receiving an order compelling the presentation in court of the material if it relates to the testimony of the witness. . . ."

Accordingly, a violation by a trial court of the *Jencks* rule stands in the same position as though the departure were of a specific command of Congress, in which case considerations of "harmless error" cannot prevent a reversal. (*Kotteakos v. United States*, 328 U. S. 750, 764-765, citing *Bruno v. United States*, 308 U. S. 287, 294.) The *Bruno* case stands for the proposition that when Congress has legislated as to a specific right of a

defendant (there, that the failure of a defendant to take the stand shall not create any presumption against him), an appellate court will not speculate as to whether the failure of the trial court to accord that right (there, a refusal to give an instruction as to no presumption) harmed the defendant, or even helped him, but will reverse.

Assuredly, if in the light of the specific interdict of 18 U. S. C. 3500, a trial court were to deny to the defense a statement as directed by that statute, reversal on appeal would be required under the *Bruno* case ruling and the *Kotteakos* case dictum, for such a denial would be a "departure . . . from . . . a specific command of Congress." A defendant the victim of a ruling in violation of the *Jencks* rule, should stand in no weaker position for, while many writers are of the view that the Jencks statute merely codified the *Jencks* rule,[5] others feel that the legislation is more restrictive.[6] Inasmuch as the situation being considered in this *amici* brief is one in which, in the words of the Government (Brief in Opposition, *Harris v. United States*, No. 619, Oct. Term, 1958, p. 16), the production of the documents would be required "under both the decision and the statute," it is incongruous to argue that there should be reversal under the latter but affirmance under the former.[7]

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[5]4 Wayne Law Review 84, 86; 67 Yale L. Jl. at 689; 26 George Washington L. R. 106, 107.

[6]22 Mo. L. R. 465, 469; 5 U. C. L. A. Law R. 147, 150; 12 Rutgers L. R. 405, 406; 31 S. C. L. R. 78, 96.

[7]*Cf., United States ex rel. Hintopoulos v. Shaughnessy*, 353 U. S. 72, 78.

## Conclusion.

A conviction obtained in a trial in which there has been a clear violation of the *Jencks* rule must be reversed.

Respectfully submitted,

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No. 451

# In the Supreme Court of the United States

OCTOBER TERM, 1958

JOEL ROSENBERG, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES

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# INDEX

## CITATIONS

Cases:

Cases—Continued

Statute:



Miscellaneous:

Miscellaneous—Continued

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 94–99) is reported at 257 F. 2d 760. The opinion of the District Court is reported at 157 F. Supp. 654 (R. 72–93). The opinion of the Court of Appeals on a prior appeal is reported at 245 F. 2d 870, and the opinion of the District Court relating to the prior trial is reported at 146 F. Supp. 555.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1958. Petitioner's motion for rehearing was denied on August 15, 1958. On September 9, 1958, Mr. Justice Brennan extended the time for

filing a petition for a writ of certiorari to and including October 14, 1958. The petition was filed on October 14, 1958, and granted on December 8, 1958. 358 U.S. 904. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

The Court limited the grant of certiorari to the first question raised by petitioner, which he phrased as follows:

> Is the rule of this Court in *Jencks* v. *United States,* 1957, 353 U.S. 657, a rule of mere procedure, or does it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?

As phrased, this question assumes several matters which we dispute, such as a violation of the *Jencks* rule and an alleged conceded error. In our view, the questions presented are as follows:

1. Whether it was proper for the trial court to examine *in camera* documents produced by the United States Attorney to determine whether they were the kind of documents which should be turned over to the defense under *Jencks* or 18 U.S.C. 3500.

2. Whether petitioner should have been permitted

to examine the statements of government witnesses prior to trial.[1]

3. Whether documents relating to witness Meierdiercks—which were clearly not his statements or reports of interviews with him, and which did not touch upon his testimony—were required to be turned over to petitioner's counsel at the trial.

4. (a) Whether a letter of the complaining witness (Miss Vossler) to the United States Attorney, in which she stated that her memory had become hazy as to details, should have been turned over to petitioner in response to his motion to examine statements of government witnesses made to the F.B.I.

(b) Whether such a letter was a statement or report touching the subject matter of the witness' testimony, within the meaning of *Jencks* or 18 U.S.C. 3500.

(c) If it was error to withhold such a letter, whether the withholding was prejudicial to petitioner on the present record.

## STATUTE INVOLVED

18 U.S.C. 3500 (Supp. V) provides:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspec-

[1] Discussed in petitioner's brief on the merits, although not mentioned in the petition for a writ of certiorari.

tion until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial

judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

## STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania on charges of (1) the interstate transportation of a

check having a value of more than $5,000 and (2) conspiring to commit such an offense. His first conviction was reversed by the Court of Appeals on the authority of *Jencks* v. *United States,* 353 U.S. 657, which had been decided in the interim between petitioner's conviction and the determination of his appeal. The case was remanded with instructions to permit petitioner to inspect both the grand jury testimony of the principal government witness (one Meierdiercks) and the statement which that witness had given the F.B.I. *United States* v. *Rosenberg,* 245 F. 2d 870 (C.A. 3).

Upon retrial of the case, petitioner was again convicted on both counts and was sentenced to imprisonment for five years on the substantive count and given a suspended sentence of three years on the conspiracy count (R. 3). The Court of Appeals affirmed. *United States* v. *Rosenberg,* 257 F. 2d 760 (R. 94–99). This Court granted certiorari on questions relating to the applicability of the *Jencks* decision and of 18 U.S.C. 3500 (R. 101). 358 U.S. 904.

The issues on which the Court granted certiorari relate to papers withheld by the trial court concerning two witnesses, Meierdiercks, who participated in the fraud, and Miss Florence Vossler, the victim of the fraud.

A. The testimony of these witnesses was as follows:

1. Charles K. Meierdiercks testified that in 1954 he was engaged in the business of buying and selling oil leases, with an office in New York City. In December of that year, petitioner approached him with a plan for the ostensible purchase of oil leases owned

by a Miss Vossler. Pursuant to that plan, the two men drove over to East Orange, New Jersey, where Miss Vossler lived, but Meierdiercks alone made the contact with her and entered into negotiations for the purchase of the leases (R. 14–23). Thereafter, petitioner, acting under an assumed name, contacted Miss Vossler by telephone and purported to be acting for competing interests who wished to buy the leases (R. 23).[2]

The upshot of these various negotiations was an agreement between Meierdiercks and Miss Vossler for the purchase of the leases at an agreed sum of a little above $57,000. The matter of Miss Vossler's income tax on the transaction came up for discussion and Meierdiercks suggested that he could arrange it, in a perfectly legal manner, so that Miss Vossler would receive the same treatment as if she were an oil company, reducing the tax (according to Meierdiercks) to ten percent of the total amount involved in the transaction. This sum Miss Vossler would have to advance to the purchaser, who would later reimburse her when the purchase price was paid. There never was any intention on the part of Meierdiercks and the petitioner actually to buy the leases, but only to get this sum amounting to ten percent (R. 23–29).

[2] The name given by petitioner when he called Miss Vossler was "Rice" (R. 23, 25–26). This was also the name given by an unidentified individual (not petitioner) who called on Miss Vossler and represented himself as interested in purchasing the leases (R. 56). Meierdiercks waited a considerable time on one occasion to meet this individual and then only saw him at a distance, petitioner explaining that it was better if they did not meet (R. 43–44).

After some hesitation, Miss Vossler agreed to this proposal. She and Meierdiercks journeyed together to Philadelphia, where Miss Vossler did her banking. There, she drew a check payable to herself in the amount of $5,760, which she had certified. Before turning over the check, however, she said that she should have a receipt. Meierdiercks then went to the rear of the lobby of the hotel at which the transaction was then taking place, and spoke to petitioner, who was working right along with him and directing his various moves, and told him of this requirement of Miss Vossler's. Petitioner wrote out a receipt which Meierdiercks took back to Miss Vossler. Miss Vossler then indorsed and turned over the check (Exh. G–1) and Meierdiercks gave her the receipt (Exh. G–2). This receipt, Meierdiercks testified, was all in the handwriting of petitioner except the name of the company which supposedly was buying the leases, which name was written in by Meierdiercks at Miss Vossler's request (R. 30–37).[3] During all of the dealings with Miss Vossler, Meierdiercks had acted under the name of "Chester LeRoy", and that was the name which petitioner wrote on the receipt (R. 37–38).

Meierdiercks pretended to mail this check given by Miss Vossler, but actually took it back to petitioner who was waiting for him at the rear of the hotel lobby. At Meierdiercks' suggestion, petitioner called a man in the oil business in Washington, D.C.,

[3] A considerable part of the testimony at the trial related to the authorship of the handwriting on this receipt. Petitioner himself did not take the stand.

and arranged to see him on a business matter, incident to which it was planned to cash the check.[4] Meierdiercks rejoined Miss Vossler and they left (R. 38–41). After his return to New York City, Meierdiercks received a telephone call from petitioner in Washington concerning a delay in the cashing of the check. The next day, petitioner made arrangements with Meierdiercks over the telephone for delivery of the latter's share of the proceeds of the check; this share was paid, but in an amount less than that which had originally been agreed upon (R. 42–43).

2. The testimony of Miss Florence M. Vossler was substantially the same as that of Meierdiercks as to the dealings and transaction between them, but she did not implicate petitioner. She related the negotiations with Meierdiercks (who had given the name of "LeRoy"), the offer by another purportedly interested buyer, and her eventual agreement to sell to "LeRoy" for the sum of $57,600. She stated that she was reluctant to sell because two of the three leases she owned had been held for less than six

[4] Petitioner's brief, at page 11, mistakenly states that this individual did not testify. He testified by deposition, stating that the check in question was brought to him by a person giving the name of Steve Parker. After the witness called the bank in Philadelphia and ascertained that the check was good, it was cashed in connection with an exchange for the purchase of an oil lease in New Mexico, Parker indorsing the check (deposition of Norman S. Bowles, not printed in record, pages 6–12). Possibly, reference to this oil lease in New Mexico was the reason for Meierdiercks' erroneous statement that Miss Vossler's oil lease was of land located there (R. 20–21). Actually, her lease was of land in Big Horn County in Wyoming, as she testified (R. 55).

months, and that Meierdiercks ("LeRoy") then made his explanation how he could arrange it so that she could receive the same treatment on taxes as an oil company. This would entail her advancing ten percent of the purchase price, which would be returned to her when she was paid for the lease (R. 54–58).

Miss Vossler testified that she agreed to this, but thought there should be papers sent to the bank in Philadelphia where she kept her money. She and Meierdiercks ("LeRoy") went together to that bank, but no papers had arrived. She wanted to consult with a man in the bank, but Meierdiercks persuaded her not to do so, giving her some reason which sounded plausible. He showed her a contract of the Gulf Production Corporation with the name of Chester LeRoy on it, which she thought was sufficient identification of the parties with whom she was dealing. She made the check and had it certified and then, after he had obtained a receipt somewhere at the back of the lobby of the hotel to which they had gone, she turned the check over to him (R. 58–60). It did not seem quite right to her not to have any papers, but Meierdiercks assured her that she had nothing to worry about. After she returned home, she made inquiries as to this company and LeRoy and found that they had no one working for them by that name. She never received anything for her money (R. 61–62).

B. The other portions of the record which are material to an understanding of the trial court's

rulings as to withholding certain papers may be summarized as follows:

1. After petitioner's first conviction had been reversed on the basis of this Court's supervening decision in *Jencks* and when the case had been remanded to the District Court, petitioner filed a motion entitled "Motion for Inspection and Examination and Inspection [*sic*] of Statements Made by Certain Government Witnesses to the Federal Bureau of Investigation" (R. 4–5). It was averred:

> The defendant believes that the Federal Bureau of Investigation has in its control and possession various and sundry statements and reports of declarations made by said witnesses concerning the matters to which they have testified and will testify at the on-coming trial.
>
> * * * * *
>
> In order to properly prepare his defense, the defendant should be permitted forthwith to examine the statements and reports in the possession and control of the Federal Bureau of Investigation.
>
> Wherefore the defendant moves that this Court order the Federal Bureau of Investigation to afford the defendant reasonable opportunity to examine and inspect and make copies, if necessary, of such statements and reports of declarations made to it by the said witnesses, Meierdiercks, Gorman, Vossler, McManus, Ronan and Ruel.

On the same day, petitioner asked for a continuance to afford him an opportunity to examine "statements and reports of declarations made to the Federal Bureau of Investigation and before the Federal Grand Jury by

the witnesses" (R. 6–7). This motion and another motion to inspect the statements of the witnesses before the grand jury were denied on the ground that the *Jencks* decision "does not require the production of the documents covered by these motions until such time as a witness is actually put on the stand by the Government." However, the court (Lord, J.) stated that petitioner might renew the motions before the judge assigned to try the case (R. 7).

The motion to inspect was renewed before the trial judge, Judge Van Dusen, who ruled that he would make the F.B.I. statement and grand jury testimony of the principal government witness, Meierdiercks, available to the defense at the end of the first day of the trial, which would be in the middle of that witness' direct testimony; and that the statements of other witnesses would be made available after their direct examination, with adequate time given for examination of the statements (R. 8–14).

2. This procedure was followed. Before adjournment in the first trial-day, Meierdiercks' statement to the F.B.I. (Exh. C–2) and his grand jury testimony (Exh. C–1) were turned over to petitioner (R. 29–30). The following morning, defense counsel stated his recollection that Meierdiercks had testified at the previous trial to being interrogated on more than one occasion by the F.B.I. and asked that all statements of this witness to the F.B.I. be turned over. The United States Attorney answered that the only statement by the witness had already been turned over; he urged that the reports of F.B.I. agents which were never shown to the witness or approved or accepted by him

need not be presented (R. 45–46). The judge, however, ruled that such reports of F.B.I. agents should be made available and that he would delete the portions not relevant to the testimony on direct examination, expressing the opinion that he was "lean[ing] over backwards" in following this procedure (R. 47–48).

The government complied with this order and the court (by letter) turned over to petitioner passages from two reports by agents, placing the balance of those reports in a sealed envelope marked "C–5 and C–6" (R. 48). The court's letter to defense counsel (Exh. C–7) read as follows (R. 70–71):

> I have had an FBI Report dated July 12, 1955, marked C–5. This report contains a copy of the statement of May 12, 1955, which I understand has been delivered to you, and has the following paragraph immediately after the statement:
>
> "After signing above statement MEIERDIERCKS recalled that on approximately 1/18/55 or 1/19/55 while he was with ROSENBERG in East Orange, NJ, ROSENBERG purchased gasoline using his credit card at a Mobile gas station located to the rear of Best & Co. Department Store in East Orange, NJ. MEIERDIERCKS said he believed that the gas station was located at the corner of Prospect & Washington Streets in East Orange, NJ."
>
> Nothing else in this report of 7/12/55 has any relevance to Mr. Meierdiercks' direct testimony.
>
> I enclose pages 2 to 4, inclusive, of an FBI Report dated 2/10/55, which I have had marked C–6. The first page of this report just contains a synopsis of the detailed report enclosed. The

> last page merely talks about a hearing and gives a description of Mr. Meierdiercks' physical characteristics. The portions not delivered to you are being placed in a sealed envelope marked "C–5 and C–6."

No objection was made at the time to this procedure, but later petitioner's counsel stated that he objected to not having received the entire F.B.I. file as to statements made by Meierdiercks concerning this particular action. The court responded (R. 49):

> I think that the Jencks case, as well as the statute, both say that you are only entitled to material which is relevant to the direct examination testimony of the witness, and that is the basis on which I have excluded the material that is in the envelope.

The papers thus excluded are described by the Court of Appeals in the following language (R. 95):

> Several of the documents contain no reference to, much less the text or any summation of, anything said by either witness. For example, two are office memoranda concerning the progress and procedure of a then pending prosecution of Meierdiercks. Another paper contains a detailed physical description and summary personal history of Meierdiercks. Still another is a record of an unsuccessful search for certain names on hotel registers at or about the time of the crime.

An office notation stating that Meierdiercks, on his first questioning, had denied any involvement in the transaction was not turned over, but Meierdiercks' statement itself denying such involvement was turned over. Also, a typewritten copy of a later detailed

statement by Meierdiercks was withheld, although the original thereof in longhand was turned over (R. 96).

3. At the conclusion of Miss Vossler's testimony, defense counsel addressed the court (R. 62):

> May it please the Court, at this time I wish to make seasonable application for production of the F.B.I. reports and the Grand Jury notes of testimony and other pertinent material in the possession of the government concerning this particular witness.

The court stated that the government had turned over for delivery to the defense the following exhibits: (a) C–8, a report dated February 21, 1955, to which is attached a statement of Miss Vossler; (b) C–9, the summary of a conference with Miss Vossler, attached to a report dated June 15, 1955; and (c) C–10, two pages of a report of May 2, 1955 (R. 62). The United States Attorney stated for the record that it was the government's position that only signed or adopted statements of the witness should be turned over, and the court remarked that it had gone beyond the statute in turning over the documents (R. 63).

The court also stated that the government had turned over correspondence between Miss Vossler and the United States Attorney's office which the judge had not yet had time to examine (R. 63). Later, having made such examination, the judge turned over Exhibit C–13, a letter of Miss Vossler dated June 5, 1956, and Exhibit C–14, a letter of Miss Vossler dated June 12, 1956. He stated that he did not think that they helped much, but they might

have some bearing (R. 64). The balance of this correspondence was placed in an envelope and sealed, being marked as "C–12" (R. 64). The only portion of this correspondence which is noted by the Court of Appeals is (R. 96):

> a letter written to the prosecutor by the victim, Miss Vossler, just before the second trial of the case, in which she expressed concern that the lapse of time had made her recollection of details of relevant transactions hazy so that she would have to rely upon her previous detailed statement to refresh her memory.

C. In closing argument, petitioner's counsel stated the defense position as to the testimony of Miss Vossler (R. 68–69):

> Mr. SINGER. At this point, let me say one thing: There isn't a single line of testimony that Miss Vossler gave from that witness stand that is not the truth. We have no reason to doubt a single word that she has said. But she didn't say what Meierdiercks said. She merely related as to how she was defrauded by Meierdiercks. She didn't substantiate all these side issues, as the Government wishes you to believe. She didn't substantiate any telephone conversations or meetings or plans or anything that allegedly occurred between Meierdiercks and Mr. Rosenberg. She didn't substantiate any of those things.

D. The Court of Appeals, in affirming the conviction, ruled that Miss Vossler's letter to the prosecutor, stating that her recollection of details was hazy, should have been turned over to the defense, but that

in the circumstances of this case the failure to do so did not prejudice petitioner (R. 96–97).

## SUMMARY OF ARGUMENT

### I

This case involves only peripheral documents from the government's files, not statements or reports of government witnesses or summaries by government agents of interviews. The trial court attempted to comply fully with the decision in *Jencks* v. *United States,* 353 U.S. 657, and recognized that it was going beyond the requirements of the statute (18 U.S.C. 3500) in requiring the production by the government of F.B.I. agents' reports which did not embody statements signed or adopted by the witnesses.

Out of abundance of caution, the United States Attorney went even further, producing various materials which were not at all within the scope of petitioner's motion for inspection—which was only for grand jury testimony and statements to the F.B.I. by government witnesses. This motion was orally extended to "other pertinent material in the possession of the government" concerning the complaining witness, but such an indefinite and vague request is explicitly condemned in *Jencks.* The trial court apparently felt itself obliged to edit this additional material and withheld the following items as to Meierdiercks, the principal government witness: material which was a mere duplication of documents turned over; a government office memorandum as to the status of the pending prosecution against Meierdiercks; a physical description and personal history of the wit-

ness; and a government record of an unsuccessful search of hotel registers. Petitioner hardly disputes that this material was properly withheld.

The only item withheld as to the complainant witness, Miss Vossler, was a letter which was part of an exchange of letters between her and the office of the United States Attorney, in which she stated that her memory had become hazy as to details of the transaction because of the lapse of time. There was never any request to examine this correspondence, even after the trial judge stated that he had such correspondence in his possession. The lack of request is one controlling reason for finding no error as to the letter. Other reasons are discussed in Point IV, *infra*.

## II

Although the question is not presented in his petition for certiorari, petitioner argues in his brief on the merits that there was error in the refusal to turn over to him, before the trial, the statements of government witnesses. There is plainly no merit to this belated contention.

A. Both the language of the "Jencks" Act (18 U.S.C. 3500) and its legislative history make clear that it was the intention of Congress to permit examination of a witness' statement *only* after he had testified on direct examination.

B. There is no doubt that Congress has power to regulate the procedure to be followed in the federal courts with respect to inspection, discovery, and production of documents in criminal cases. The statute is therefore valid unless violative of due process. But

it cannot be said that this statute is contrary to concepts of fundamental fairness. Before its enactment, there was great doubt that an accused had a right to pre-trial inspection of the statements of government witnesses. The question was not presented by the facts in *Jencks,* nor decided by the Court in its opinion in that case. The only circuit holding that such a right existed was the District of Columbia, where it was held, in a capital case, that the right existed. *Fryer* v. *United States,* 207 F. 2d 134, certiorari denied, 346 U.S. 885. This Court recognized in *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 220, that the Rules of Criminal Procedure did not grant broad rights of discovery; Rule 16 limited discovery to evidence obtained from others by seizure or process. And the whole question of discovery in criminal cases is one on which authorities have disagreed. Congress had the right to make its choice between these conflicting views, especially since a statement given to a government agent is not evidence and is admissible at the trial only for the purpose of impeachment. It was entirely reasonable for the statute to permit inspection only after the person making the statement had testified, when it would be clear whether or not the statement touched upon the subject matter of his testimony.

## III

Petitioner also attacks the constitutional validity of the *in camera* inspection made by the trial judge. Subdivision (c) of the "Jencks" statute provides that such an examination may be made to determine a

government claim that a statement ordered to be produced contains matter which does not relate to the subject matter of the testimony of the witness. Here, a somewhat different situation was presented to the trial court when the government, after objecting that the court's order went too far, itself produced to the court more material than the court's order required. The judge possibly felt that he was responsible for the production of this additional material and attempted to cull out such papers as had no proper place in the case. In doing so, he felt that the procedure of subdivision (c) of the statute could appropriately be followed, and he caused all the withheld material to be sealed for the examination of the appellate courts.

Congress did not specifically provide a procedure for determining whether a document is in fact a statement of the witness relating to the subject matter of the testimony. Similarly, *Jencks* itself was concerned solely with admitted statements concededly touching on the subject matter of the witness' testimony. But, as in this and the companion cases, there is often a problem whether the requested document is properly producible to the defendant, in whole or in part. Subsection (c) of 18 U.S.C. 3500 deals with one aspect of that problem; the courts have been following the same procedure as to the other aspects. We therefore treat generally the question of the propriety of an *in camera* inspection of documents—whether it involves excision of unrelated matter, determination of whether the document is a "statement", or determination of whether it re-

lates to the subject matter of the witness' testimony at trial.

A. As just indicated, the *Jencks* decision does not deal with the right to *in camera* inspection to determine whether documents are in fact statements of the witness or do in fact bear on the subject matter of his testimony at the trial. Rather, *Jencks*—which involved conceded statements by witnesses admittedly touching on the subject matter of their testimony—was concerned with the separate question of whether such statements would nevertheless be barred from production until shown to be admissible in evidence because of the presence of an inconsistency, etc. The Court distinguished between "relevancy" for the purpose of production and inspection by the defense, and "relevancy" for the purpose of admissibility into evidence. As to the latter, it was said that the excision of irrelevant material, before admission into evidence, would be made only after inspection of the document by the defense. Both from the language of the opinion and in the context of the cases discussed, it is clear that the Court was disapproving only of *in camera* inspection to determine admissibility into evidence, once the paper had been produced. The entire postulate of the opinion is that the prosecution is under no duty to produce in the first place, unless the document embodies a "statement" or "report" which in fact touches on the subject matter of the testimony.

B. Since, for the reasons just discussed, the *Jencks* decision did not reach the type of *in camera* inspec-

tion involved here—inspection to determine whether a document is a statement or report relating to the subject matter of the testimony—there is not present in this case any real question as to whether the *Jencks* rule embodies a constitutional right or a rule of procedure. Nevertheless, since the issue has been argued, we state our position that *Jencks* establishes a procedural rule.

The phrase in *Jencks* upon which the constitutional argument rests, that "[j]ustice requires no less," has reference to the holding of the Court that, once statements of witnesses are shown to relate to their trial testimony, the defense should be allowed to examine them in order to determine their evidentiary worth or their use for cross-examination. This right is plainly preserved by the "Jencks" statute. But even as to this right, it does not seem to us that the Court intended to state that "due process requires no less". *Jencks* explained and applied the earlier decision in *Gordon* v. *United States,* 344 U.S. 414, which explicitly declared that its ruling was made on non-constitutional grounds. As in the *McNabb* case, the Court has often referred to its exercise of supervisory power over the lower federal courts, in procedural matters, as involving considerations of "justice". Moreover, if the *Jencks* rule is a constitutional one, it would have broad implications as to state trials and convictions. The virtually unanimous interpretation of *Jencks* by the lower federal courts is that it embodies a rule of procedure.

C. *In camera* inspection to determine whether a requested document is properly subject to production (in whole or in part) is the correct procedure. Some-

one has to decide whether the document should properly be produced. There is no reason in logic or fairness why a defendant should see government documents which do not bear on his case; accordingly, the defense is not entitled to see any government papers it may request in order to determine for itself whether the government is correct in maintaining that the documents do not have to be produced. The solution of *in camera* determination by the judge is fair to both the defense and the prosecution. The defendant is fully protected against the possibility of an erroneous or arbitrary ruling by the preservation of the document for inspection by the appellate courts.

There are precedents for such inspection by the court. Rule 30(b) of the Federal Rules of Civil Procedure, which is based on an extensive body of case law, provides for *in camera* inspection where trade secrets are involved. While this relates to a civil proceeding, the matter withheld may go to the crucial issue of the merits of a case, whereas the *in camera* inspection of Section 3500 relates only to the excision of matter which is in no way germane to the subject matter of the testimony and is normally usable only for impeachment. Proper secrets of state may likewise be withheld; traditionally this is a matter for determination by the trial judge under such circumstances as to guard the secret with due regard for the interests of the parties.

## IV

The Court of Appeals held, we believe properly, that the only matter withheld from petitioner which is worthy of serious consideration was a letter of Miss

Vossler, the complaining witness, to the United States Attorney, in which she adverted to the lapse of time since the transaction and the probable effect of the delay on her recollection of details. Wholly aside from the fact that this was not a "statement to the F.B.I." within petitioner's written request, nor subject to production under the vague oral request for "other pertinent material" relating to this witness (see Point I, *supra*), it was not a paper subject to production which could have been properly requested under *Jencks*. That case requires only that a statement or report of a witness touching the subject matter of his testimony be produced. A "statement", both in its ordinary meaning in law and in the context of *Jencks*, refers to an account by the witness of the facts in issue. The purpose of requiring production of such a statement—or "report," as it was in that case where the witness was a special government agent—was to permit comparison with the witness' testimony in court in order to attack the witness' credibility. *Jencks* did not concern itself with other materials in the government's files which might be said to bear on the testimony of the witness; it did not open up those files to the defendant so that he could cull out any type of item which might possibly prove useful on cross-examination.

Furthermore, the only purpose which justifies the requirement that the government produce a statement or report is for the end of attacking the credibility of the witness. Here, there was no attack on Miss Vossler's credibility. On the contrary, the trustworthiness of the witness was expressly affirmed

by defense counsel, who relied strongly on her failure to mention various details which might be associated with petitioner, and also brought out clearly that she had refreshed her recollection. Since the reason for the rule does not apply in this case, the rule itself has no application.

## ARGUMENT

### I

### THE FACTUAL SETTING; THE TYPE OF DOCUMENTS INVOLVED; THE ISSUES AS TO PRODUCTION WHICH WERE DISPUTED AT THE TRIAL; AND THE ISSUES DISPUTED IN THIS COURT

A. As set forth in the Statement, *supra*, pp. 11–15, the trial judge attempted to comply fully with the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, and even to go further. He turned over to the defense, not only prior statements by the government witnesses, but also their grand jury testimony and reports of oral interviews by F.B.I. agents with the witnesses. On the question of whether F.B.I. reports which did not embody statements signed or adopted by the witness should be turned over, the trial judge ruled in favor of petitioner, over the government's objection, stating that he was "lean[ing] over backwards" (R. 47–48) and was going beyond the new statute (18 U.S.C. 3500) (R. 62–63). The controversy in this case thus revolves around peripheral documents, not statements of witnesses about the facts, or even investigative reports or summaries of interviews.

B. Also, much of the controversy arises only because, out of an abundance of caution, the United States Attorney produced, and the trial judge, ex-

amined and sealed for consideration by the appellate courts, materials which were not even within the scope of petitioner's demand for production. In his pretrial written motion for inspection, petitioner asked only for "statements and reports in the possession and control of the Federal Bureau of Investigation" (R. 5). The judge denied the motion for production at that time, holding that the requested material would be made available only after each witness had testified—except for Meierdiercks, as to whom it would be furnished at the end of the first trial day (R. 10–13). Meierdiercks' prior statements, the grand jury minutes, and the reports of interviews with Meierdiercks were turned over at that time. In addition, the United States Attorney, going beyond the court's order and also beyond petitioner's request, produced, not only the statements and the reports of interviews with this witness, but a number of other items. These the court apparently felt itself under an obligation to edit, withholding them as Exhibits C–5 and C–6 (R. 48–49)—the documents consisted of: (1) office memoranda concerning the progress of a prosecution then pending against Meierdiercks; (2) a physical description and personal history of this witness; (3) a record of an unsuccessful search of hotel registers; (4) an office notation that Meierdiercks at first denied implication in the transaction (the basis for this notation, *i.e.*, the witness' statement itself, having been turned over); (5) a typewritten copy of a statement of this witness, the longhand original of which was turned over. Except for the last, not one of these documents was a statement of Meierdiercks in any

sense; not one of them bore on the issues of the trial except to the extent that they duplicated documents already turned over.

The Court of Appeals properly held that there was no error in not turning these items over. Except insofar as petitioner attacks generally the validity of the procedures followed in this case with respect to turning over of documents, these papers are not really in issue here.

C. As to Miss Vossler, at the conclusion of her testimony, the defense made the following demand (R. 62):

> Mr. SINGER: May it please the Court, at this time I wish to make seasonable application for production of the F.B.I. reports and the Grand Jury notes of testimony and other pertinent material in the possession of the government concerning this particular witness.

The grand jury testimony and the witness' own statements were turned over and, despite government objection, also F.B.I. agents' reports which did not purport to be substantially verbatim statements of the witness (R. 62–63).

The only things withheld were the items designated as C–12, correspondence between Miss Vossler and the United States Attorney's office. This was neither grand jury testimony nor statements to the F.B.I.—the only things specifically requested by petitioner's counsel. If it be claimed that the original written motion was broadened by the addition, when it was orally renewed, of the words "and other pertinent material" (*supra*), the answer is that such a broad and vague request cannot be interpreted to require that the United

States Attorney empty his file on the chance that something be inadvertently withheld which might serve as a basis for reversal in the event of conviction. This was clearly stated in *Jencks,* 353 U.S. at 666–667, where the Court was discussing *Gordon* v. *United States*:

> The necessary essentials of a foundation, emphasized in that opinion, and present here, are that "[t]he demand was for production of * * * *specific documents and did not propose any broad or blind fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up. Nor was this a demand for statements taken from persons or informants not offered as witnesses." (Emphasis added.) 344 U.S., at 419. We reaffirm and re-emphasize these essentials. "For production purposes, it need only appear that the evidence is relevant, competent, and outside of and exclusionary rule * * *." 344 U.S., at 420.

Counsel's oral reference to "other pertinent material" was certainly no request for "specific documents," but, if it had any meaning at all, only a fishing expedition on the chance that something could be turned up that might prove advantageous. Thus, there was actually no occasion for the United States Attorney to have turned over to the court his correspondence with Miss Vossler, and to the extent that error is predicated on the failure of the court to turn over her letter (to which the Court of Appeals referred), the simplest answer is that the defense made no proper demand therefor.

Not only did petitioner fail to request the production of this correspondence, but when its existence was

made known, he still evinced no interest in it. When the trial judge turned over the other material pertaining to Miss Vossler (statements, grand jury testimony, reports), he made the following statement (R. 62–63):

> Now the government has also made available a whole series of letters, correspondence * * * between the United States Attorney's Office, apparently, and Miss Vossler, and I will look through these and see if they have any bearing on the testimony, I haven't had any chance to do that yet.

No comment was made by petitioner's counsel (R. 62–63). After a brief colloquy with the United States Attorney, who said that the judge was going too far, the judge overruled the objection and said (R. 63):

> [M]eanwhile I will read these letters and see if there is anything in them. It appears to me that the letters merely concern Miss Vossler's coming here to testify, but I will look over all of them and I will put them in a separate envelope which will be marked C–12 so that they will be here for any appellate court to look at.

Again, petitioner's counsel made no comment or request to see the correspondence (R. 63–64). Shortly thereafter, two letters of Miss Vossler were turned over to petitioner, but there was still no request to see the remaining correspondence (R. 64).

D. In the rest of this brief, we show (1) that the trial court properly held that 18 U.S.C. 3500 prohibited production of any reports at the pre-trial stage and that this limitation was one which Congress had the power to impose; (2) that the trial court had

power to determine *in camera* whether documents produced by the Government were, under the statute (18 U.S.C. 3500), the type of statements relating to the subject matter of the testimony of a witness as to which the statute requires production; (3) that the trial court properly held that the letter from Miss Vossler to the prosecutor (which is the only document which could even arguably be said to bear on the issues in this case) was not subject to production either under *Jencks* v. *United States*, 353 U.S. 657, or the statute; and (4) that, in view of Miss Vossler's testimony and the fact that the defense plainly asserted that it was accepting the truth of her testimony, there is no room for the argument that failure to turn over Miss Vossler's letter operated to the prejudice of petitioner.

## II

### PETITIONER WAS NOT ENTITLED TO INSPECT GOVERNMENT PAPERS PRIOR TO TRIAL

The contention is now made, although not mentioned in the petition for certiorari, that petitioner should have been permitted to inspect, before trial, statements of government witnesses to the F.B.I. as well as to examine the minutes of their testimony before the grand jury. Since a substantial portion of petitioner's brief is devoted to a discussion of this point, we consider it, although we do not view it as properly within the issues presented to this Court. Rules 23(1)(c) and 40(1)(d)(2) of the Revised Rules of this Court; *Lawn* v. *United States*, 355 U.S. 339, 362–363, fn. 16.

A. CONGRESS SPECIFICALLY PROVIDED THAT STATEMENTS BY GOVERNMENT WITNESSES TO GOVERNMENT AGENTS SHOULD NOT BE PRODUCED BEFORE TRIAL BUT ONLY AFTER THE WITNESS HAS TESTIFIED

1. 18 U.S.C. 3500(a) is explicit in directing that statements of a government witness to an agent of the government shall not be produced before trial. It provides:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

A clearer statement of Congressional direction would be hard to imagine.

2. The legislative history squarely confirms the purpose and meaning of the explicit language.

(a) *In the Senate:* As reported by the Senate Judiciary Committee (S. Rep. No. 981, 85th Cong., 1st Sess. p. 1), the bill (S. 2377) provided on this phase:

> (a) In any criminal prosecution brought by the United States, no statement or report of a witness or prospective witness (other than the defendant) which is in the possession of the United States shall be the subject of subpena, or inspection, except as provided in paragraph (b) of this section.

Paragraph (b) delayed discovery until after the witness had testified. The report specifically stated (p. 4) that it was the intent of the bill to provide for production only after the witness had testified.

During debate, this section was amended to read as follows:

> (a) In any criminal prosecution brought by the United States, no statement or report of a Government witness or prospective Government witness (other than the defendant) made to an agent of the Government which is in the possession of the United States shall be the subject of subpena, or inspection, except, if provided in the Federal Rules of Criminal Procedure, or as provided in paragraph (b) of this section.

This version represented a substantial change from the language originally reported by the Senate Judiciary Committee; the phrases "made to an agent of the Government" and "if provided in the Federal Rules of Criminal Procedure" were inserted (103 Cong. Rec. 15791, 15920).

The Acting Attorney General objected to the addition of the phrase relating to the Federal Rules, pointing out in a letter to Senator Eastland, 103 Cong. Rec. 15791:

> 1. The proposed change in the language of section (a) implies that prior statements of Government witnesses can be secured by the defendant in a criminal case through discovery proceedings under the present Federal rules of criminal procedure. The implication in the suggested language would be bound to cause confusion and might result in a broad and highly undesirable extension of the right of discovery in criminal cases which is not at all intended by the subcommittee or the Congress.

The Senate sponsors of the amended provision argued that the language suggested no implication as feared by the Attorney General; that the words "*if* provided in the Federal Rules" as opposed to "*as* provided in the Federal Rules" guarded against this possibility; and that the object was to say "If it is there, we are not changing it. If it is not there, no matter" (103 Cong. Rec. 15791). The Senators opposed to the position of the Justice Department also argued that, without the inserted language, the broad prohibition of Section (a) would wipe out protections afforded by Rules 15(a), 16, and 17(c) of the Federal Rules of Criminal Procedure. Thus, Senator Morse said that the practical effect of the legislation desired by the Department would be felt most strongly in criminal antitrust and income tax cases where the Rules had made it possible for defendants to inspect documents and papers of an evidentiary nature obtained and held by the government (103 Cong. Rec. 15809).

The legislators supporting the Department's position contended that the legislation was intended to be an exclusive procedural rule for dealing with problems arising in the wake of the *Jencks* decision, and that the inclusion of the reference to the Rules would only add to the confusion of the lower courts (103 Cong. Rec. 15920, 15922).

Senator Dirksen, offering an unsuccessful amendment to delete the reference to the Rules, set off a vigorous debate. To illustrate his argument that lower courts would be misled by the reference, Mr.

Dirksen cited the *Fryer* case,[5] and said that he wanted to be sure that the Rules as carried on the statute books did not become the vehicle for "fishing expeditions" (103 Cong. Rec. 15921). Senator Cooper, who believed that the *Jencks* case had actually limited and circumscribed the effect of Rule 17, thought it conceivable that the rules of discovery ought to be changed, but regarded that as an entirely separate question deserving study apart from *Jencks* (103 Cong. Rec. 15923). Senator Hruska agreed that the matter of pretrial proceedings should receive full legislative study, but argued that this was a reason for deleting the reference to the Rules since its mere existence "will give additional ground upon which trial judges may hang their variations of the decision in the *Jencks* case" (*id.*, p. 15924). Senator Clark, in disagreement, noted that the reference was placed in the proposed legislation to make it clear that Congress was in no way dealing with the Federal Rules of Criminal Procedure; he charged that the attempt to delete the words was in fact an attempt to repeal, by implication, those rules (*id.*, p. 15925). Senator Javits noted that both sides of the debate were trying to accomplish the same result—neither wanting to affect the Rules (*id.*, p. 15926). Senator O'Mahoney, sponsor of the legislation, reviewed the Rules and the authorities, reemphasizing that he felt the fears of the Justice

[5] *Fryer* v. *United States*, 207 F. 2d 134 (C.A.D.C.), certiorari denied, 346 U.S. 885, in which the Court of Appeals had ruled in a capital case that the defendant was entitled to see, before trial, statements by all prospective government witnesses.

Department unwarranted since the legislation was dealing with the very narrow field of statements of witnesses whom the government voluntarily selected and summoned to court to testify (*id.*, pp. 15928, 15929). He argued that the *Fryer* case was bad law and would not be followed and that the preoccupation with technical legalistic arguments might well result in the loss of the basic bill which every agency of the government believed necessary (*id.*, pp. 15928, 15922). As noted above, the Dirksen amendment failed.

A brief explaining the bill, printed (at Senator O'Mahoney's request) as part of the Congressional Record after its passage in the Senate, noted, in part, that it provided (103 Cong. Rec. 15939):

> 1. An exclusive procedure to be followed during trial in demands for, and production of, statements and reports of witnesses made to, and in the possession of, the Government.
>
> * * * * *
>
> 3. That such statements and reports of a Government witness shall be produced only after such witness has testified on direct examination during the trial.

(b) *In the House:* In the bill passed by the House (H.R. 7915), the language of Section (a) read (103 Cong. Rec. 16125, 16130):

> In any criminal prosecution brought by the United States, any rule of court or procedure to the contrary notwithstanding, no statement or report of any prospective witness or person other than a defendant which is in the possession of the United States shall be the subject

of subpena, discovery, or inspection, except as provided in paragraph (b) of this section.

Paragraph (b) delayed production, for the inspection of the court *in camera*, until after the witness had testified.

The committee report accompanying the introduction of the bill took issue with the suggestion that the legislation would eliminate pre-trial discovery and inspection as it existed in criminal cases. It argued that Rule 16 of the Federal Rules dealt only with specified materials obtained from the defendant or others by seizure or process, and Rule 17 only with documentary evidence and objects. The report contended that any construction of Rule 17(c), to authorize the issuance of a subpena for the pre-trial production of the statement of government witnesses, extended far beyond the purpose and language of the rule and ought to be eliminated (H. Rep. No. 700, 85th Cong., 1st Sess., pp. 6–7).

Representative Celler made an unsuccessful attempt to change the language of the House bill to conform to that of the Senate version, by inserting an exception with regard to the Federal Rules (103 Cong. Rec. 16129). He argued that the words "any rule of court or procedure to the contrary notwithstanding" were dangerous words which cavalierly abrogated the rules and wiped out pre-trial discovery (*id.*, pp. 16114, 16119). Representative (now Senator) Keating replied that there was no foundation for any such suggestion since the rules as they existed gave no such right with respect to statements of government witnesses. Asked (by Representative Celler) why, then, was it necessary to include the language "any rule of court or procedure to the con-

trary notwithstanding", Mr. Keating answered (*id.*, p. 16129):

> The bill does not intend to deal with, or to affect in any way the Federal rules. It attempts to establish a single procedure independent of those rules. We seek, by that language to make it clear that those rules do not apply to this situation. We establish the procedure in paragraph (b) and in (a) we state that that procedure is the exclusive procedure to be followed.

(c) *The Conference Bill:* The two Houses being thus in disagreement, the bill went to conference. It emerged from conference, and subsequently became law (103 Cong. Rec. 16489, 16742), with Section (a) in its present form (H. Rep. No. 1271, 85th Cong., 1st Sess., p. 1). The report contained a statement by the House Managers (p. 3) that the changes agreed upon by the conferees "make it abundantly clear that no such statement need be produced until said witness has testified on direct examination in the trial."

In the Senate, just prior to agreement on the conference report, the following colloquies took place (103 Cong. Rec. 16488):

> Mr. JAVITS. I note from the report that the reference to the Rules of Criminal Procedure has been eliminated. Does that leave the matter as follows: That when the Government has the document defined as a statement, and when it is in its possession, and has been made by a Government agent, then, no matter how it is produced—whether produced pursuant to the Rules of Criminal Procedure or produced pursuant to the rather precise rule in the decision in the *Jencks* case, or for any other reason—

if it is that kind of a statement, the court acquires, with respect to that statement, rights which are specified in this measure; is that correct?

Mr. O'MAHONEY. So long as it is a relevant and competent statement and deals with the testimony of the Government witness.

Mr. JAVITS. That is to say, in the case of a Government witness who has testified.

Mr. O'MAHONEY. Exactly.

Mr. JAVITS. Then the words, as the Senator from Wyoming has read them, must apply; is that correct?

Mr. O'MAHONEY. Yes; and I think it should be made clear that *all the procedure must occur after the Government witness produced by the United States has testified, and not before.* [Emphasis added.]

* * * * *

Mr. CLARK. * * * As I understand, the elimination of the reference to the Federal rules, in the redraft presented by the conference committee, does not indicate, and is not intended in any way to indicate, that this measure is intended to amount to a change in any way of the Federal Rules of Criminal Procedure.

Mr. O'MAHONEY. We are not dealing with the Federal Rules of Criminal Procedure. We are dealing only with the procedures to be followed in the production of these reports.

* * * * *

Senator Dirksen stated that the revised text had the concurrence of the Department of Justice (*id.*, p. 16489).

In the House, Representative Celler remarked that the conference bill did not contain the controversial

provision which, in his opinion, would have abrogated the Federal Rules, and that it embodied the language and substance of the Senate bill which he had sought on the floor of the House. Representative Keating disagreed most emphatically with this. He said that the conference bill confirmed and fortified the position of those House members who had voted for the stronger House measure, saying (*id.*, pp. 16738–16739):

> There were two points of difference between the Senate and House versions. * * * The Senate yielded to the House on both points in effect. The first was, will the defendants have the right to inspect statements of witnesses before they go into the courtroom. There was fear that there was language in section (a) of the Senate bill which would imply the right of defendants to get such evidence before they ever got into the courtroom. *The wording here* not only does not recognize that they might have such a right, but *positively and definitely says they shall not have that right.* Section (a) of the bill is even stronger than the House bill which we considered and for which an overwhelming majority of this body voted. [Emphasis added.]

Out of this mass of diversified expressions one conclusion is, we think, inescapable. Whatever effect was attributed to either the insertion or the deletion of the reference to the criminal rules—whether the interest was protection of the Federal Rules from *abrogation* on the one hand or *unwarranted extension* on the other—all were agreed that the language of Section (a) of the new Act would control exclusively the produc-

tion of the documents to which it applied, and that such statements were not to be produced until after the witness had testified.

B. CONGRESS WAS ACTING WITHIN ITS CONSTITUTIONAL POWER IN DETERMINING THAT STATEMENTS OF WITNESSES SHOULD NOT BE PRODUCED BEFORE TRIAL

As discussed in our brief in *Lev et al.*, Nos. 435–437, pp. 49, *et seq.*, there is no doubt that Congress has the power to regulate the procedure to be followed in the federal courts with respect to inspection, discovery, and production of documents in criminal cases. Its determination that statements of witnesses should not be produced before trial, but only after the witness has testified, is therefore controlling unless its direction to that effect can be said to violate due process. Clearly, the provision of the statute here at issue does not violate concepts of fundamental fairness.

Even before enactment of this legislation it was extremely doubtful that there was any provision authorizing pre-trial inspection of the statements of witnesses. The only Court of Appeals which ruled that there was such authority was the District of Columbia Circuit, which so held in a capital case. *Fryer* v. *United States*, 207 F. 2d 134, certiorari denied, 346 U.S. 885.* This Court recognized in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220, that the Rules of Criminal Procedure did not grant broad rights of discovery in criminal cases. The history of the various drafts of Rule 16, the true discovery rule, shows that

*The differing views of various district courts are summarized in the appendix to the opinion in *United States* v. *Peltz*, 18 F.R.D. 394, 408–409 (S.D.N.Y.). See also *United States* v. *Benson*, 20 F.R.D. 602 (S.D.N.Y.).

its limitation to evidence "obtained from or belonging to the defendant or obtained from others by seizure or by process" had been deliberate. See *United States* v. *Peltz,* 18 F.R.D. 394, 398 (S.D.N.Y.), where the history of the rule is discussed.

The whole question of discovery in criminal cases is one on which commentators and jurists disagree. See, for example, the conflicting views expressed in Yankwich, *Concealment or Revealment?,* 3 F.R.D. 209, 210–211; *United States* v. *Garsson,* 291 Fed. 646, 649 (S.D.N.Y.); *State* v. *Tune,* 13 N.J. 203, 98 Atl. 2d 881; Comment, *Pre-trial Disclosure in Criminal Cases,* 60 Yale L.J. 626 (1951); Comment, *The Jencks Case,* 15 Washington & Lee L. Rev. 88 (1958). Congress had the constitutional right to consider the arguments against pre-trial disclosure more persuasive than the arguments in its favor.

With particular relation to the precise question here, *i.e.,* pre-trial production of the statements of witnesses, non-disclosure does not deprive the defendant of any constitutional rights. Such statements are not affirmative evidence of the facts set forth. *Bridges* v. *Wixon,* 326 U.S. 135, 153; *Ellis* v. *United States,* 138 F. 2d 612 (C.A. 8). They are useful, if at all, only for impeachment of the witness. It is a reasonable limitation to require production only after the witness has testified, so that it can be properly ascertained that the statements in the government's possession do actually relate to the testimony of the witness. So long as adequate opportunity is given for examination of the statements, Congress had the right to fix the time of their production. The decision in *Jencks* v. *United States,*

353 U.S. 657, 667–669, does not bear at all on this question. The Court there was dealing with the right to production *after* the witness has testified. See *United States* v. *Benson*, 20 F.R.D. 602 (S.D.N.Y.).

There is no contention that petitioner was not afforded adequate opportunity to examine the statements, and in fact abundant time was plainly given to examine the statements of both Meierdiercks and Miss Vossler, *supra*, pp. 12–13, 15–16, 26, 27–29. The belated attempt to predicate error on the denial of petitioner's pre-trial motion for production is wholly without merit.

## III

### THE TRIAL COURT HAD THE RIGHT TO EXAMINE DOCUMENTS *IN CAMERA* IN ORDER TO DETERMINE WHETHER THE DOCUMENTS WERE STATEMENTS WHICH RELATED TO THE SUBJECT MATTER OF THE TESTIMONY OF THE WITNESS

Petitioner attacks, generally, the constitutional validity of any *in camera* inspection by the trial judge in order to determine whether requested documents should be produced. This is, of course, a problem which is bound to arise under the rule of the *Jencks* case, as well as under the new statute, 18 U.S.C. 3500. Someone must determine what documents, if any, should appropriately be turned over. Either the defense counsel has a right to see everything he demands, simply because he demands it,[7] or there must be a screening by the judge or the prosecutor or both.

In subdivision (c) of 18 U.S.C. 3500, *supra*, pp. 4–5,

[7] Including the right to inspect to see whether the government has, in the defendant's view, complied with his request (see *infra*, pp. 56–58).

Congress specifically provided a procedure whereby, if the government claims that a statement *subject to production* contains matter which does not relate to the subject matter of the testimony of the witness, the court examines the statement *in camera* and excises such portions of the statement as do not relate to the subject matter of the testimony. This provision does not literally apply to the situation here where the government produced, not documents which contained irrelevant portions, but papers in its possession which it claimed were not subject to production at all, either because (1) as to Meierdiercks they were not statements of the witness and not documents bearing on the issues and (2) as to Miss Vossler, they were letters which did not really relate to the subject matter of her testimony at the trial.

It is evident from the fact that the trial court withheld the papers from the defense and sealed them for consideration by the appellate court that the trial court and the Court of Appeals were of the view that this type of determination came within the spirit of subdivision (c), and that the question here is related to the attack on the *in camera* procedure in (c). Congress did not specifically provide a procedure for determining whether a document is a statement of the witness relating to the subject matter of the testimony, and therefore subject to production. But, as already indicated, someone must first determine what documents relate to the testimony of the witness and what do not, and if the prosecutor has any doubt on this matter, it is to the advantage of the defendant to have that determination made by the judge and not

502838—59——4

the prosecutor. For this reason, in this point we treat generally the right to preliminary *in camera* inspection when there is any issue as to whether a document should be produced—whether the issue involves excision of unrelated matter, determination of whether the paper is actually a "statement" of the witness, or determination of whether it relates to the subject matter of the witness' testimony at the trial.[8]

A. THE *JENCKS* DECISION DOES NOT DEAL WITH THE RIGHT TO *IN CAMERA* INSPECTION TO DETERMINE WHETHER DOCUMENTS ARE STATEMENTS OF THE WITNESS OR BEAR ON THE SUBJECT MATTER OF THE TESTIMONY AT THE TRIAL

The argument that no *in camera* inspection at all is proper stems from the following language in *Jencks* v. *United States*, 353 U.S. 657, 669:

> The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved.[15] *Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness.* Only after inspection of the reports by the accused, must the trial judge determine admissibility—*e.g.*, evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See *Gordon* v. *United States*, 344 U.S. at 418. [Emphasis added, footnote 15 omitted.]

[8] On the *in camera* and excision provisions of 18 U.S.C. 3500, see also the Brief for the United States in *Scales* v. *United States*, No. 488, this term, at pp. 99 *ff.*

This language petitioner construes wholly out of context to support the argument that the trial judge cannot even look at documents submitted to him by the government to determine whether they are—what the italicized portion of the above quotation says they must be—reports "relat[ing] to the testimony of the witness". But it is quite clear—from the terms the Court used in the opinion, the specific problem with which it was dealing, and the cases it discussed—that in this respect *Jencks* was concerned only with the turning over of documents which had already been admitted (or shown) to be reports or statements relating to the witness' testimony. The Court was not treating with the antecedent but quite different problem, involved here, of what procedure is to be followed in order to determine whether or not requested documents do in fact relate to the witness' testimony, and whether or not they are statements or reports.

1. Throughout its opinion in *Jencks*, the Court indicated that it was concerned only with conceded reports and statements shown (*i.e.*, proved or admitted) to relate to the witness' evidence. That is the language it used in the very section of the opinion on which petitioner relies (*supra*, p. 44). In its precise holding, the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all *reports* of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., *touching the events and activities as to which they testified at the trial*" (353 U.S. at 668). (Emphasis added.)

Again, the Court said: "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant *statements or reports* in its possession of government witnesses *touching the subject matter of their testimony at the trial*" (353 U.S. at 672. (Emphasis added.) And this careful wording accorded fully with the facts of the *Jencks* case; it was undisputed that there were in that case statements and reports of the witnesses, and equally undisputed that these papers related to the witnesses' testimony at the trial.

2. The problem the Court was considering in *Jencks* was whether such conceded statements, admittedly touching on the witnesses' evidence, could nevertheless be withheld from the defense until some inconsistency was found or shown. In this connection, the Court referred to its prior opinion in *Gordon* v. *United States,* 344 U.S. 414, 418, where in speaking of the government's concession that it would have been prejudicial error to exclude from production to the defense statements admissible in evidence, the Court said that "[d]emands for production and offers in evidence raise related issues but independent ones, and production may sometimes be required though inspection may show that the document could properly be excluded." The government was arguing in *Gordon* that the prior contradictory statement was itself not admissible in evidence and that, if the fact of contradiction was otherwise shown, the statement, no matter what was in it, would add

nothing of *evidentiary* value, so that non-production was not error. As we have noted, there was not involved, either in *Jencks* or in *Gordon,* any issue as to whether the statement bore upon the testimony of the witness at the trial; in both cases, it was undisputed that there was such a statement and that it related to the testimony at the trial. Both cases dealt solely with the production of that type of document.

Even more significant is the nature of the cases which the Court cited at footnote 15 of the *Jencks* opinion (see *supra,* p. 44), when it said it was disapproving the practice of producing documents to the trial judge for his determination of "relevancy and materiality." The cases cited (*United States* v. *Grayson,* 166 F. 2d 863; *United States* v. *Beekman,* 155 F. 2d 580; *United States* v. *Ebeling,* 146 F. 2d 254; *United States* v. *Cohen,* 145 F. 2d 82; *United States* v. *Krulewitch,* 145 F. 2d 76) were all from the Second Circuit and set forth the rule in that circuit limiting production to the defense even when the statement was admittedly that of the witness and admittedly related to his testimony at the trial. It was the Second Circuit rule that, even on that kind of a showing of relevancy to the issues at the trial, it was for the trial judge first to determine whether there was some inconsistency or omission which could be said to have impeaching value, before turning the statement over to the defendant. When this Court disapproved of the Second Circuit rule, it was referring to "relevancy and materiality" only in that sense, *i.e.,* that the statement was sufficiently different from the witness' testimony that

it could properly be used to test or impeach his credibility. This Court held that such a determination should initially be made by the defense, not by the court alone.

3. This is obviously a far different thing from saying that the trial judge cannot determine that a document has no relevancy because it does not relate to the testimony of the witness at all, or because it is not a statement of the witness. Those were not questions which this Court had any occasion to consider in *Jencks*, and it did not decide those questions. See Comment, *The Jencks Legislation: Problems in Prospect*, 67 Yale L.J. 674, 687 (1958), quoted *infra*, pp. 54–55. The duty of the government under *Jencks* is to produce, upon request, *statements* or *reports* of government witnesses "[s]o far as they directly touch the criminal dealings" (353 U.S. at 671), elsewhere in the opinion described as "relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial" (at 672). As for the excision of irrelevant matter from relevant documents, or a determination of whether a requested document is in fact a "statement", or a decision as to whether a "statement" does touch upon the witness's testimony—the *Jencks* opinion and the *Jencks* holding leave these questions entirely open.

B. EVEN WITH RESPECT TO ITS REJECTION OF *IN CAMERA* INSPECTION OF ADMITEDLY RELEVANT STATEMENTS OF THE WITNESS, JENCKS DID NOT LAY DOWN A CONSTITUTIONAL RULE

Since, for the reasons just discussed, we do not be-

[9] See also the discussion in the Brief for the United States, in *Scales* v. *United States*, No. 488, this Term, at pp. 106–108.

lieve that *Jencks* reached the question of the type of *in camera* inspection here at issue—inspection to determine whether a document is the statement of the witness or a statement relating to the subject matter of the testimony—we do not believe that there is really involved in this case the question which petitioner has posed, whether the *Jencks* rule embodies a constitutional right or a rule of procedure. But, since the Court's grant of certiorari refers to this question as phrased by petitioner, we point out that the *in camera* aspect of that decision seems to us clearly a ruling on procedure. The single phrase in the *Jencks* opinion upon which the constitutional argument rests ("Justice requires no less") refers, as we have indicated, to the holding of the Court that, once statements of witnesses are shown to relate to their testimony on the trial, the defense shall be granted the opportunity to inspect them to determine their evidentiary worth (353 U.S. at 668–669). In other words, the Court felt that it would be unfair to deny the defense access to statements of the witness, attributable to the witness, which do relate to the testimony of the witness at the trial.

But in the paragraph of its opinion dealing with *in camera* inspection, the Court indicated the procedural basis for its ruling (353 U.S. at 669). It referred to *Gordon* v. *United States*, 344 U.S. 414, 418, in which it had said that "*[I]n the absence of specific legislation*, questions of this nature are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience' ". (Emphasis added.) It follows that

the Court in *Jencks* was exercising its general supervisory authority when it addressed itself to the problem of *in camera* inspection. There is no suggestion that the Court was applying constitutional principles. Indeed, the *Gordon* case itself noted that production of papers in the hands of the government was a new development in the law.

Moreover, the phrase "[j]ustice requires no less" has not been considered by the Court as the equivalent of "due process requires no less". In *McNabb* v. *United States*, 318 U.S. 332, where the Court first announced the rule excluding confessions from federal trials obtained during a period of unreasonable delay between arrest and arraignment, Mr. Justice Frankfurter, speaking for the Court, said (318 U.S. at 340–341):

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.
>
> * * * * *
>
> The principles governing the admissability of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. * * * And in formulating such rules of evidence for federal criminal trials the *Court has been guided by considerations of justice not limited to the strict*

*canons of evidentiary relevance.* [Emphasis added.]

So, in *Jencks,* the Court was not dealing with the minimal standards of due process but was adopting for the federal courts rules of inspection and discovery more beneficial to the accused than required by due process. Cf. *Riser* v. *Teets,* 253 F. 2d 844, 846, certiorari denied, 357 U.S. 944, in which the Ninth Circuit refused to apply the principles adopted in *Jencks* to a California conviction. In the *Jencks* opinion itself, the Court, when rejecting the rule that a showing of inconsistency is an essential requisite to production, employed similar non-constitutional language (353 U.S. at 668): "A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."

In treating the *Jencks* issue of *in camera* inspection as a non-constitutional procedural problem, the Court was following its practice in related areas of criminal justice. The decisions establishing standards for the admission of confessions,[10] those dealing with the common law disqualification as to spousal testimony,[11] that reconsidering the propriety of the two witness rule in perjury cases,[12] and those excluding

[10] *McNabb, supra;* see also *Upshaw* v. *United States,* 335 U.S. 410; *Mallory* v. *United States,* 354 U.S. 449; Rule 5(a), Federal Rules of Criminal Procedure.

[11] *Funk* v. *United States,* 290 U.S. 371; cf. *Hawkins* v. *United States,* 358 U.S. 74.

[12] *Weiler* v. *United States,* 323 U.S. 606.

wiretap evidence by state agents who wiretapped without the participation of federal officers,[13] were not decided on constitutional grounds. In *Jencks*, the Court, as it explicitly observed, was merely reaffirming and re-emphasizing the essentials of *Gordon*—a case clearly bottomed on a non-constitutional base.

Finally, it should be noted that the lower federal courts have read *Jencks* as announcing a non-constitutional rule of procedure subject to Congressional limitation or annullment. See *United States* v. *Spangelet*, 258 F. 2d 338, 340–341 (C.A. 2); *United States* v. *Gandia*, 255 F. 2d 454, 455 (C.A. 2); *Riser* v. *Teets*, 253 F. 2d 844, 846 (C.A. 9), certiorari denied, 357 U.S. 944 (denial of habeas corpus, court finding *Jencks* not applicable to state conviction); *United States* v. *Angelet*, 255 F. 2d 383, 384 (C.A. 2); *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905; *United States* v. *De Lucia*, 262 F. 2d 610, 614 (C.A. 7), pending on petition for a writ of certiorari, No. 745, this Term; *United States* v. *Lev*, 258 F. 2d 9, 13 (C.A. 2), pending on writ of certiorari, Nos. 435, 436, 437, this Term; *United States* v. *Palermo*, 258 F. 2d 397, 400 (C.A. 2), pending on writ of certiorari, No. 471, this Term; *Scales* v. *United States*, 260 F. 2d 21, 43–44 (C.A. 4), pending on writ of certiorari, No. 488, this Term; *United States* v. *Consolidated Laundries Corp.*, 159 F. Supp. 860, 868 (S.D.N.Y.); *United States* v. *Waldman*, 159 F. Supp. 747, 748 (D.N.J.); *United States* v. *Grunewald*, 162 F. Supp. 621, 625 (S.D.N.Y.);

[13] *Benanti* v. *United States*, 355 U.S. 96; cf. *Lustig* v. *United States*, 338 U.S. 74, 78–79.

*United States* v. *Papworth*, 156 F. Supp. 842 (N.D. Tex.), affirmed, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854.[14]

C. *IN CAMERA* INSPECTION TO DETERMINE WHETHER A REQUESTED DOCUMENT IS PROPERLY SUBJECT TO PRODUCTION (IN WHOLE OR IN PART) IS THE CORRECT PROCEDURE

As noted at the outset of this Point, the "Jencks" Act, in its subsection (c), provides an *in camera* procedure for the excision of irrelevant material from an otherwise relevant statement, but does not explicitly provide a similar mechanism for deciding whether a requested document is a statement by the witness or (if it is such a statement) whether it relates to the testimony of the witness at the trial. Only the latter two issues are involved in this case, and both were decided by the trial court under a procedure compa-

[14] Where *Jencks* seems to have been treated in some measure as a constitutional ruling, it has been on the aspect requiring production of written statements of the witness. See *Communist Party of United States* v. *Subversive Activities Control Board*, 254 F. 2d 314, 328 (C.A.D.C.) (administrative proceeding): "We hold that, where the Government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the Government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the Government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the Jencks case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done." Cf. *National Labor Relations Board* v. *Adhesive Products Corp.*, 258 F. 2d 403, 408 (C.A. 2) (statement of witness used by him shortly before trial to refresh recollection is subject to inspection).

rable to that established in 18 U.S.C. 3500(c). We have shown, in Subsections (A) and (B) of this Point (*supra*, pp. 44–53), that *Jencks* does not prohibit this procedure. Now we show that it was entirely correct and fully accords with due process.

1. There is no reason in logic or in fairness why a defendant should see government documents which do not bear on his case. Hence there is no reason why irrelevant matter should not be excised (under 18 U.S.C. 3500(c)) from a statement he is otherwise entitled to see. This is a duty often ministerial in character, involving few or none of the delicate questions as to the tactical use which could effectively be made of inconsistencies and like matters, as mentioned in *Jencks*. As developed in our brief in *Lev et al.*, Nos. 435–437, at pp. 38–39, there were numerous expressions by members of Congress that the excision provision was not intended to change the essential holding of the *Jencks* decision, but only to affect the procedure thereunder.[15] As a recent comment on the excision provisions of the "Jencks" Act has said (*The Jencks Legislation: Problems in Prospect*, 67 Yale L.J. 674, 687–688 (1958)):

> The Jencks decision necessarily granted the prosecution the right to edit irrelevant matter prior to defense examination of relevant documents; the government's privilege was not waived as to irrelevant information. The *in camera* procedure disapproved in that case was

[15] S. Rep. No. 569, 85th Cong., 1st Sess. (1957); S. Rep. No. 981, 85th Cong., 1st Sess. (1957); H. Rep. No. 700, 85th Cong., 1st Sess. (1957).

> examination directed toward an initial denial of statements not admissible in evidence. Under the *in camera* procedure provided by the act, on the other hand, the trial court is merely assuming the duty of the prosecutor in *Jencks*—editing irrelevant matter from relevant documents. Thus, the question before the court is essentially one of determining the scope of governmental privilege—a judicial determination traditionally made in *in camera* proceedings.

It is then pointed out that, as to this phase of the problem, the Act goes somewhat further than the *Jencks* decision in protecting the accused:

> Moreover, while in theory the right of access to authenticated statements may be identical under the act and the *Jencks* decision, pragmatically the accused may now obtain more material. For the test of relevancy is no longer applied by the zealous prosecutor, but by the presumably impartial trial judge. Similarly, the entire documents are available as a routine matter to the appellate court for review of the trial court's ruling. Certainly, under *Jencks,* both the trial and appellate courts could demand and examine government documents in their entirety if the defense established that relevant matter had been wrongfully excised. The statutory procedure, however, restricts the possibility that ignorance of the material's existence or inability to persuade the court of the need to examine the excised matter will preclude the defense from obtaining relevant information.

See also the discussion on this point in the Brief for the United States in *Scales* v. *United States,* No. 488, this Term, at pp. 101–106.

2. Similarly, there is nothing in the concepts of fundamental fairness which gives a defendant a right to see all documents in the government's possession when, as here, they are not the kind of documents which are subject to production. As noted above (*supra,* pp. 13–15, 26–27), the documents with respect to Meierdiercks, to the extent that they were not duplicated by papers turned over, were clearly not statements or reports of the witness, or had no relation to the issues in the case or to Meierdiercks' testimony. As to Miss Vossler's letter, we discuss below (Point IV, *infra,* pp. 62–67) the reason why we believe her letter was not subject to production, even if it was within the scope of the defense demand. For this reason, the government was not required even to hand the materials to the trial judge. Certainly, the decision of the prosecutor to make disclosure to the court of all papers he had relating to the witness, in order to obtain a judicial ruling on the matter, cannot be said to deny fundamental fairness. Since a defendant should not see what need not be produced to him, it is proper for the trial judge to decide whether the requested document is a statement of the witness or whether if it is a statement it relates to the subject matter of the testimony of the witness.

If the prosecutor is not to decide these questions for himself, then the judge must do it *in camera.* The defense obviously cannot join in that decision without being made privy to the very paper which the gov-

ernment claims is not a statement or does not relate to or touch upon the witness' testimony, and for that reason (since the document is part of the government's confidential files) should not be seen by other than authorized persons. Petitioner's contention, in short, begs the question. For his argument is, in essence, that the defense is entitled to see a paper contained in the government's files in order to determine for itself whether the government is correct in maintaining that the paper—because of its confidential character and because it is not a statement or in no way relates to the subject matter of the witness' testimony—should not be seen by the defense.

If petitioner were correct, it would be difficult to see why the defense would not equally be entitled to examine every document in the government's files having any relation to the witness on any subject, in order to enable the defendant and his counsel to determine for themselves if any particular paper is a statement which should be produced. That would indeed lead to the broadest of fishing expeditions. See *Jencks,* 353 U.S. at 666–667; *Sells* v. *United States,* No. 5992, C.A. 10, decided December 30, 1958, slip op. 26–27, pending on petition for a writ of certiorari, No. 691 Misc., this Term; Brief for the United States in *Scales* v. *United States,* No. 488, this Term, at pp. 101–106.

The defendant is fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge. He is entitled under subsection (c) of the Act (*supra,* pp. 4–5)—and that procedure was followed here (see *supra,* pp. 13–14, 15–16; R. 95)—to have

the documents preserved for inspection by the appellate court, and a determination by that court of the correctness of the trial judge's rulings, in the event that the defendant is convicted and elects to appeal. The statutory procedure thus protects the accused's proper cross-examination rights while at the same time safeguarding the privacy of government records in which the accused has no proper interest.

3. *In camera* examination of evidence has been approved in varying circumstances. Rule 30(b) of the Federal Rules of Civil Procedure, promulgated by this Court, approves a similar procedure for the protection of trade secrets, where it may be ordered—

> that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.[16]

While greater elasticity in matters of this kind may be possible in a civil suit than in a criminal prosecution, it should be borne in mind that the "Jencks" Act, here under consideration, does not contemplate an *in camera* examination to determine issues which go to the merits, as in Rule 30(b), but only to determine whether documents or portions thereof relate to the

[16] The note of the Advisory Committee on Rules said that this provision was "introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26."

matter in issue—an evidentiary, not a substantive, determination.

The practice approved by Rule 30(b) was based on sound experience. In *DuPont Powder Co. v. Masland*, 244 U.S. 100, 103, a suit to enjoin a former employee of plaintiff from revealing secret processes, the Court said, through Mr. Justice Holmes:

> But the judge who tries the case will know the secrets, and if in his opinion and discretion it should be advisable and necessary to take in others, nothing will prevent his doing so. It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.[17]

*In camera* examination of documents involving secrets of state is likewise an approved practice in some circumstances. In *Reynolds* v. *United States*, 192 F. 2d 987, 997 (C.A. 3), it was said:

> Such examination must obviously be *ex parte* and *in camera* if the privilege is not to be lost in its assertion. * * *

[17] The English practice is the same as to trade secrets. See *Badische A. & S. Fabrik* v. *Levinstein*, 24 Ch. D. 156; *Renard* v. *Levinstein*, 10 L.T.R. (n.s.) 94, where the offer was made to disclose the process to experts appointed by the court. American cases approving *in camera* examination of such evidence include *Herold* v. *Herold China & Pottery Co.*, 257 Fed. 911 (C.A. 6); *John T. Lloyd Laboratories, Inc.*, v. *Lloyd Bros. Pharmacists, Inc.*, 131 F. 2d 703, 707 (C.A. 6); *Edison Electric Light Co.* v. *United States Electric Lighting Co.*, 45 Fed. 55, 59 (involving the invention of the incandescent electric lamp).

> * * * When Government documents are submitted to them *in camera* under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged.

This decision was reversed, 345 U.S. 1, this Court going further and supporting the government's position that the claim of privilege by the head of the executive department would be accepted in Federal Tort Claims Act suits without even an *in camera* examination. Three of the Justices dissented for substantially the reasons set forth in the opinion of the lower court. While the majority pointed out a distinction between civil and criminal cases, in that the government can be said to have waived its privilege by instituting the criminal prosecution, the Court was there speaking of withholding evidence that may be exculpatory and was not discussing the propriety of an *in camera* examination of documents to determine whether they in fact touch upon the matter at issue.

Rule 228 of the Model Code of Evidence of the American Law Institute and Rule 33 of the Uniform Rules of Evidence both recognize the privilege as to secrets of state, making the determination of whether a certain matter is a secret of state a question for the judge. Although the method of making such a determination is not specifically set out, obviously resort to *in camera* inspection of documents might become necessary in order to avoid disclosure of the

very matter claimed as privileged.[18] Unquestionably, there must be some effective procedure for the protection of secrecy in such matters as atomic fission or fusion, which might upon occasion make desirable an *in camera* examination of evidence to determine the extent to which it deals with those matters.[19]

In the same connection, Professor Wigmore says, "The Court should of course provide that the *irrelevant parts* of a book or document be not seen by the opponent."[20] As to the question of state secrets and who shall determine their availability to the opposing party, he says that obviously it should be the judge, by analogy with other privileges. Criticizing the English position that such determination should be by the head of the administrative department and that the judge should not even see the document in question, he observes, "It would rather seem that

[18] Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 93 (1949), states the essentials of a fair procedure in determining claims of executive privilege as follows: "(1) the agency should be impartial; (2) it should be in a position to consider all the interests involved in a particular case; (3) its decision should be quickly rendered; (4) that the hearing should not defeat the very secrecy that is claimed; (5) that there should be provisions for such review of its decisions as would be necessary for protection against abuses." The commentator questions whether "privilege" is a proper term to use here, but refers to "executive privileges" for want of a better term, extending the term to state and military secrets, communications from informers, communications between public officials and various miscellaneous matters. On this point, see also *Duncan* vs *Cammell, Laird & Co.* [1942], A.C. 624.

[19] See Haydock, *Evidentiary Problems and Atomic Energy*, 61 Harv. L. Rev. 468 (1948); Newman, *Control of Information Relating to Atomic Energy*, 56 Yale L.J. 769 (1947).

[20] 8 Wigmore, *Evidence* (3d ed.), Section 2200, n. 8, p. 119.

the simple and natural process of determination was precisely such a private perusal by the judge."[21]

In sum, the procedure set up by 18 U.S.C. 3500 (c), and followed with respect to the analogous questions here of whether the documents were subject to production at all, is simple and logical. It is in line with accepted practice in similar matters and it provides safeguards to an accused under the principles of *Jencks*. The trial court, in following this procedure in the present case, was acting consistently with the decision of the Court in *Jencks* and protected every right indicated by that ruling.

## IV

### NO ERROR RESULTED FROM THE TRIAL COURT'S REFUSAL TO TURN OVER MISS VOSSLER'S LETTER AT THE TRIAL

As noted in Point I, *supra*, pp. 25 *ff.*, the only documents at issue here are those which were outside the scope of the demand made by petitioner and which were turned over to the judge for his inspection in order to make full disclosure to the court. The documents withheld as to Meierdiercks were not subject to production on any theory since they were not statements of the witness and did not go to the issues in the case. See Point I, *supra*, pp. 26–27. The only document which the Court of Appeals thought should have been turned over was the letter to the prosecutor from Miss Vossler with

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[21] *Id.*, Section 2379, pp. 798–799. For the English position that the determination of what constitutes state secrets should be by the head of the administrative department, see *Duncan* v. *Cammell, Laird & Co.* [1942], A.C. 624; *Beatson* v. *Skene*, 5 H. & N. 838, 853.

respect to the delay in the second trial; in the letter, she mentioned that the lapse of time had made her recollection of details hazy, so that she would have to rely upon her previous detailed statement to refresh her memory. It is the government's view that this letter was not subject to production, either under the decision in *Jencks* or under 18 U.S.C. 3500, and that, in any event, if there was error it was clearly non-prejudicial and harmless on this record.

A. THE LETTER WAS NEITHER A STATEMENT NOR A REPORT TOUCHING THE SUBJECT MATTER OF THE WITNESS' TESTIMONY

Even if a proper request had been made to inspect correspondence between the complaining witness (Miss Vossler) and the United States Attorney, such a request should not have been granted.[22] *Jencks* held that the relevant statements or reports of government witnesses touching the subject matter of their testimony should be turned over on defense request (*supra*, pp. 44–48). As ordinarily used in a legal context, a statement is an account of some or all of the facts of a transaction which the lawsuit has placed in dispute. Such was certainly the meaning in the *Jencks* decision, where the only statements or reports in question were those of the two principal government witnesses to the F.B.I. The expression "reports" was used because the two witnesses were special government agents, or informants, so their

[22] As shown in Point I, *supra*, pp. 27–29, petitioner never made a proper request for Miss Vossler's letter (or correspondence), and should therefore be precluded, in any event, from basing alleged error on the failure to turn the letter over to the defense.

"statements" would be in the shape of reports to their superiors.

The whole purport of the *Jencks* decision was that fairness demanded that a statement of facts given by a witness at the trial be subject to comparison with a prior statement of the facts given by the witness extra-judicially, as a basis for attacking the credibility of the witness. Nothing was said in the opinion to suggest that correspondence between a witness and the prosecutor, not containing any statement of facts by (or attributable to) the witness, must be produced for scrutiny. And *Jencks* did not purport to require that the government must turn over to the defense everything in its files which can conceivably be used in cross-examining a witness or impeaching his testimony. Rather, *Jencks* was limited to the type of impeachment which can come from inconsistent or different accounts by the witness of the facts as to which he is testifying. To read more into the opinion, to see it as sanctioning the compulsory production of all aids to the defendant's case, is to interpret *Jencks* as authorizing the opening of government files for a fishing expedition to ascertain if anything of conceivable tactical value can be found—a practice specifically disapproved in the opinion, *supra,* p. 28.

The letter did not touch on the facts or on the subject matter of Miss Vossler's testimony. Its purpose was merely to inquire about the second trial. That it happened to mention a fact of fairly common knowledge—that time dims memory—does not transform it into a "statement" or "report" which bears on the issues in the case. This is so not only under

the *Jencks* decision but likewise under 18 U.S.C. 3500. The statute is addressed to a statement "which relates to the subject matter as to which the witness has testified." As noted, the letter did not relate to the subject matter of Miss Vossler's testimony.

B. THE LETTER COULD NOT HAVE BEEN USED TO IMPEACH ITS AUTHOR, IN VIEW OF PETITIONER'S CLEAR-CUT POSITION AT THE TRIAL THAT MISS VOSSLER WAS TELLING THE TRUTH

Petitioner's counsel could not have been more emphatic than he was in closing argument, when he said, "There isn't a single line of testimony that Miss Vossler gave from that witness stand that is not the truth. We have no reason to doubt a single word that she has said." *Supra*, p. 16. He went on to contend that the witness' testimony did not carry any weight because she in no way implicated the petitioner.[23] This position, taken at the trial, cannot be abandoned on appeal for supposed advantages to be gained by a contrary contention at the present stage.

The purpose of permitting inspection of a witness' statement is stated in the *Jencks* opinion, 353 U.S. at 668:

> Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them.

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[23] Petitioner likewise takes this position in his brief, page 12. He there heads his summary of this witness' testimony: "*Miss Florence M. Vossler, who neither identified nor involved the petitioner*, testified * * *." (Emphasis the petitioner's.)

If a witness is concededly telling the truth and, moreover, if it is the defense position that her testimony was unimportant because it did not in any way attach guilt to the petitioner, there would be no possible purpose to be served by bringing in her comment in the letter about the delay in the trial causing her memory to become hazy as to details. As the court below pointed out (R. 97), the details of her testimony were of no importance in any event, as she was admittedly defrauded. The only issue at the trial was whether petitioner was a party to the admitted fraud; on that issue Miss Vossler's possible haziness as to details had not the slightest bearing."

This contention on the government's part is wholly aside from and in addition to the general question of harmless error, discussed in the government's brief in *Lev et al.*, Nos. 435–437, this Term, at pp. 77–80. Here, it is not a question of what use could have been made through a prior statement to impeach a witness whose credibility is under attack—on which the Court may consider that scope should be left to defense counsel to determine how the statement can be so used.

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" Indeed, it might well have harmed petitioner to show that Miss Vossler's recollection was hazy on details. Petitioner's counsel's closing argument (*supra*, p. 16) stressed that Miss Vossler's evidence "didn't substantiate all these side issues, as the Government wishes you to believe. She didn't substantiate any telephone conversations or meetings or plans or anything that allegedly occurred between Meierdiercks and Mr. Rosenberg. She didn't substantiate any of those things." The inference was that Miss Vossler did not testify to these "side issues" because they did not occur; if it had been brought out that her recollection was dimmed, there would have been another explanation for her failure to recall "these side issues".

Rather, the narrow issue presented here is whether a reversal need be ordered because of the failure to turn over a document said to be useful for impeachment when petitioner took the position before the jury that the witness had told the truth. The purpose of the various rules applicable to criminal trials is to insure substantial justice based on sound and purposeful reasons. Where the aim of a particular rule is to permit impeachment of a witness whose credibility is under attack, the rule should not be invoked where the witness' credibility is not only unquestioned, but emphatically affirmed.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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